88-182

No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA

and

JOHN M. GRAVITT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court resolve the issue expressly reserved in *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.7 (1981), whether an order refusing to approve a settlement agreement is appealable as a final collateral order under 28 U.S.C. § 1291?

2. Is an order preventing the United States from entering a settlement agreement and dismissing an action under the False Claims Act appealable as a final collateral order under 28 U.S.C. § 1291?

STATEMENT UNDER RULES 21.1(b) AND 28.1

The petitioner herein, the General Electric Company, is a publicly held company. A listing of the nonwholly-owned subsidiaries and affiliates of the General Electric Company is included in Appendix K at 49a to 54a. The petitioner was the defendant-appellant below. The plaintiff in this action, the United States, was also an appellant below.

The appellee below was John M. Gravitt, who was allowed to intervene in this action by the District Court under Federal Rule of Civil Procedure 24. Mr. Gravitt originally brought this action under the *qui tam* provisions of the False Claims Act on behalf of the United States, but the United States is now represented by the Department of Justice.

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Petitioner, General Electric Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 3, 1988.

OPINIONS BELOW

The unreported May 3, 1988 opinion of the Court of Appeals appears in Appendix A at 1a to 2a. The January 22, 1988 opinion of the United States District Court for the Southern District of Ohio is reported at 680 F. Supp. 1162, and is reproduced in Appendix B at 3a to 8a. The August 24, 1987 Report and Recom-

mended Decision of Honorable Robert A. Steinberg, United States Magistrate, is unreported and appears in Appendix C at 9a to 29a. Other opinions of the Court of Appeals and the District Court are also unreported and appear in Appendix D at 30a to 31a (opinion of February 7, 1986) and in Appendix E at 32a to 34a (opinion of January 9, 1986), Appendix F at 35a to 36a (opinion of February 27, 1986) and Appendix G at 37a (opinion of May 6, 1986), respectively.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 3, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

1. 28 U.S.C. § 1291 (1982) provides, in pertinent part, that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

2. The False Claims Act, prior to its amendment in 1986, provided, in pertinent part, that:

> [b](1) A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. . . . An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.
>
> [b](3) If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

31 U.S.C. §§ 3730(b)(1), (3) (1982).

Since its amendment in 1986, the False Claims Act provides, in pertinent part, that:

> [b](1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
>
> [c][2](B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

31 U.S.C. §§ 3730(b)(1) and 3730(c)(2)(B) (Supp. IV 1986).

STATEMENT

This is a proceeding under the False Claims Act originally instituted by respondent Gravitt in the name of the United States against his former employer, petitioner General Electric Company ("GE"). App. C at 9a. In accordance with 31 U.S.C. §§ 3730(b)(2), (3) (1982), the United States Department of Justice assumed control of the case. App. C at 9a; App. I at 44a. After a lengthy investigation, the Department of Justice negotiated a settlement with GE. App. C at 10a; App. I at 44a to 47a. On December 13, 1985, counsel for the United States filed a stipulated dismissal of this action pursuant to the settlement agreement. App. J at 48a. Since that time the District Court has repeatedly denied its consent to this settlement and dismissal.[1] Both GE

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[1] At all relevant times, the court's consent has been required for dismissal of a False Claims Act case, at least if the action was being maintained by a private person. *See* 31 U.S.C. § 3730(b)(1) (1982); 31 U.S.C. § 3730(b)(1) (Supp. IV 1986). Under an amendment enacted after the settlement and dismissal were filed in this case, the Act provides for the court to determine whether

and the United States have unsuccessfully sought appellate review of the District Court's actions, first, under 28 U.S.C. § 1292(b) (1982) and then, after the latest order, under 28 U.S.C. §§ 1291, 1292(a)(1) (1982). GE now seeks review by this Court to determine whether the District Court's order refusing to approve the settlement and dismissal of this case, sought by both the United States and GE for over two and a half years, is appealable under 28 U.S.C. § 1291. The Court of Appeals for the Sixth Circuit determined that it is not.

Summary Of Facts And Proceedings Below

1. This case involves allegations of fraud arising out of labor vouchering practices in the small Development Manufacturing Operation ("DMO") shop at GE's Evendale, Ohio aircraft engine plant. App. C at 9a. In 1983, respondent John M. Gravitt, a DMO employee who had recently received notice of his layoff pursuant to an ongoing reduction-in-force at the plant, sent a letter to GE alleging that employees in his unit were mischarging labor time. GE immediately instituted an internal investigation and disclosed Mr. Gravitt's allegations to the Government. App. H at 41a to 42a.

In the summer of 1983, the Defense Contract Audit Agency ("DCAA") instituted its own investigation. App. H at 41a. The DCAA ultimately found that the practices complained of had resulted in no damage to the United States and that the GE employees involved did not intend to defraud the Government. *Id.* Rather, the purpose of the scheme was to dissuade GE from laying off employees at the DMO facility by reallocating workload data. *Id.* The misvouchering involved both government and commercial contracts, and the investigations concluded that there was no net damage to the Government. App. C at 22a; App. H at 41a. The DCAA con-

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a settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B) (Supp. IV 1986).

cluded that, contrary to Mr. Gravitt's allegations, GE rather than the United States had lost money as a result of the misvouchering practices and had been cheated by its own employees. *Id.*

Nevertheless, nearly a year later, in October 1984, Mr. Gravitt filed a complaint in the name of the United States as a putative *qui tam* plaintiff or "relator" under the False Claims Act. App. H at 42a. The Justice Department immediately entered the action and assumed control of its prosecution pursuant to 31 U.S.C. § 3730(b)(3) (1982). App. C at 9a; App. I at 44a. In order to confirm the DCAA's earlier findings, the Government instituted joint criminal and civil investigations of the same allegations and called witnesses before a grand jury. App. C at 10a, 23a. In the fall of 1985, after interviewing over fifty people and reviewing tens of thousands of documents, Government investigators from the Federal Bureau of Investigation, the Air Force Office of Special Investigations, the DCAA and the Department of Justice again concluded that GE did not intend to defraud the Government and that, far from causing damage to the United States, GE itself had been cheated by the misvouchering scheme. App. C at 16a, 20a, 26a to 27a.

Based on these consistent findings, the Department of Justice declined to seek an indictment of GE and instituted negotiations with GE to settle the False Claims Act case. App. C at 10a. After several months of negotiations, the parties entered a settlement, reflecting the Government's desire to receive the statutory penalty ($2,000) for each of 117 possible false claims, even though it had suffered no injury in fact. App. C at 18a, 26a to 27a. Under this agreement, GE agreed to pay $234,000 and agreed that it would not seek compensation for undercharges on its Government contracts that resulted from the misvouchering practices. App. I at 45a to 47a.

2. The United States subsequently filed a stipulated dismissal of the action with the district court. App. J at

48a. Despite the fact that he had no personal knowledge about the joint investigation or the settlement negotiations, Mr. Gravitt charged that the settlement was a "sweetheart deal" that should not be allowed. App. C at 10a, 25a. The United States and GE responded that the "consent" of court required for dismissals by 31 U.S.C. § 3730(b)(1) (1982) did not empower the court in a case controlled by the Department of Justice to engage in a substantive review of the settlement and prevent the Government from dismissing the action.[2] App. C at 10a; App. E at 33a.

In February 1986, without receiving any evidence, the District Court summarily declared the settlement to be "unfair," denied its consent to dismiss, and appointed a United States Magistrate as a Special Master under Federal Rule of Civil Procedure 53 to review the fairness of the settlement. App. F at 35a to 36a. After it became clear that Mr. Gravitt was not a proper "relator" under the False Claims Act and had no standing to participate in the action, the court, over objections from the Government and GE, allowed Mr. Gravitt to intervene under Federal Rule of Civil Procedure 24 to contest the fairness of the settlement. App. C at 10a; App. G at 37a.

3. The Special Master conducted an exhaustive sixteen-month inquiry into the concerns of both the District Court and Mr. Gravitt with the settlement and allowed Mr. Gravitt discovery to support his allegations of impropriety. App. C at 11a. As a result of these efforts, the Master found that the evidence refuted each of Mr. Gravitt's allegations. In his lengthy Report and Recommended Decision, the Special Master concluded that there was no "collusion" between the parties, as alleged by Mr.

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[2] The United States and GE were granted certification of an interlocutory appeal under 28 U.S.C. § 1292(b) (1982) challenging the district judge's authority to disapprove the settlement and order evidentiary proceedings. App. E at 32a to 34a. The Sixth Circuit by order entered on Feb. 7, 1986 refused to accept the certified appeal. App. D at 30a to 31a.

Gravitt, and that the Government had conducted a diligent and thorough investigation. App. C at 23a to 28a. He also found that the evidence fully supported the Government investigators' determinations of no damage and no intent to defraud and, accordingly, recommended that the District Court approve the settlement and terminate the litigation. App. C at 26a to 29a.

On review of the Special Master's recommendation pursuant to Mr. Gravitt's objections, the District Court again rejected the settlement and declared it to be "inadequate." App. B at 8a. While acknowledging that the settlement should have been approved if judged by the standards of proof applicable under the False Claims Act at the time the settlement was entered, the District Court rejected the Special Master's recommendation on the ground that the Master should have applied the lower standards of proof contained in the 1986 amendments enacted nearly a year after the settlement was entered. App. B at 6a, 8a.

The District Court, however, did not address the United States' contention that the settlement was fully adequate regardless of whether the original or amended False Claims Act standards are applied, since the Government has repeatedly determined—and the Special Master agreed—that there was in fact no intent to defraud the Government and no injury in fact to the Government. Rather, the District Court deferred to Mr. Gravitt's objections to the manner in which the Government conducted its investigation (objections that were found by the Special Master to be groundless), and criticized the Justice Department for failing to welcome Mr. Gravitt's attempts to carry on this prosecution on behalf of the United States in place of—and in conflict with—the Justice Department. App. B at 6a to 8a.

4. GE and the United States filed timely appeals of the District Court's order rejecting the settlement and stipulation of dismisasl, arguing tha it constituted a col-

lateral order under 28 U.S.C. § 1291 and a refusal to enter an injunction within the meaning of 28 U.S.C. § 1292(a)(1). App. A at 1a. Mr. Gravitt moved to dismiss the appeals for lack of jurisdiction. *Id.*

Both the United States and GE opposed the motion, relying in part on this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), in which the Court squarely held that refusal to approve a settlement containing injunctive-type provisions is appealable under § 1292(a)(1) and reserved the question whether refusals to approve other types of settlements are appealable under the collateral order doctrine under § 1291.

On May 3, 1988, however, the Court of Appeals for the Sixth Circuit dismissed the appeals. App. A at 1a to 2a. The Court asserted:

> "The refusal to adopt a settlement agreement is an interlocutory order which is neither a 'collateral' order under 28 U.S.C. § 1291, nor is it an interlocutory order 'refusing' an 'injunction' under 28 U.S.C. § 1292(a)(1). *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981)."[3]

App. A at 2a.

REASONS FOR GRANTING THE WRIT

I. The Case Presents the Important Issue Reserved in *Carson v. American Brands, Inc.* Concerning the Appealability of an Order Rejecting a Settlement.

In *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Court explained that it had granted certiorari because of "a conflict in the Circuits" on the question whether rejection of a settlement is either a final collateral order under § 1291 or, in appropriate cases, an order refusing an injunction under § 1292(a)(1). 450 U.S. at 82. Various circuits had split on each

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[3] On July 27, 1988, GE filed in the Sixth Circuit a petition for a writ of mandamus to compel the District Court to accept the settlement, on which no action has been taken.

of those two issues. *See id.* at 82 n.6. The Court held that, since the proposed settlement there would have imposed mandatory obligations, the order rejecting the settlement was appealable under 28 U.S.C. § 1292(a)(1) as tantamount to an order refusing an injunction. *Id.* at 83. The Court added that, in light of that disposition, "[w]e therefore need not decide whether the order is also appealable under 28 U.S.C. § 1291." *Id.* at 83 n.7.

This case now provides the proper vehicle for resolving that important question left open in *Carson* where, as is more typical of settlements, the negotiated end to the litigation involves the payment of money and the release of claims without other mandatory or prohibitory terms. Inexplicably, the court below read *Carson* as holding that an order refusing to accept a settlement is appealable under "neither" statute. App. A at 2a. Of course, the Court of Appeals was flatly wrong in characterizing what *Carson* held under § 1292(a)(1).

In concluding that *Carson* somehow answered the separate question that this Court expressly stated it was reserving—appealability under § 1291—the Court below relied on a footnote in *E.E.O.C. v. Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 874 (1987), which purported to explain the application of *Carson* to the collateral order rule. The Ninth Circuit held in *Pan American* that § 1291 is not available as a means to obtain review of an order refusing a settlement agreement, allegedly because *Carson*'s analysis under § 1292(a)(1) "was clearly intended to provide a definitive basis and standard for such interlocutory appeals." *Id.* Accordingly, the court found that its previous decision in *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), which had allowed review of an order denying a settlement under § 1291, was implicitly overruled by *Carson*, even though *Carson* had expressly re-

served consideration of appealability under § 1291. *Pan American*, 796 F.2d at 317 n.7.[4]

This construction of *Carson* is squarely at odds with this Court's express reservation of the § 1291 issue. In no way did the Court imply that § 1292(a)(1) is the only statutory basis for appeal, since that view would have resolved the acknowledged conflict in the circuits on the § 1291 issue rather than reserving it for a later case—such as this one—that involves essentially a monetary rather than injunctive settlement.

II. An Order Rejecting a Settlement and Stipulation of Dismissal Is a Final Collateral Order.

The approach taken in *Pan American* and in the decision below is inconsistent with *Carson*'s analysis of the harm that may result if an order refusing to allow a settlement agreement cannot be appealed prior to final judgment after trial. The Court determined in *Carson* that an order preventing the parties from terminating their litigation pursuant to a settlement cannot be effectively appealed and remedied after final judgment. *Carson*, 450 U.S. at 86-88. The Court recognized that the entire purpose of settlement agreements—"to avoid the costs and uncertainties of litigation"—is lost if the parties are forced to trial. *Id.* at 87. Accordingly, the Court found that, at least in circumstances where—as in the present case—a party could withdraw consent to the agreement and nullify the settlement once trial is held, an order refusing the settlement could have the " 'serious, perhaps irreparable, consequence' of denying the parties

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[4] *Norman v. McKee* was among the conflicting circuit court cases cited by *Carson*. 450 U.S. at 82 n.6. The Court also cited *In re Int'l House of Pancakes Franchise Litig.*, 487 F.2d 303 (8th Cir. 1973), in which the Eighth Circuit allowed an appeal of an order denying a settlement. 450 U.S. at 82 n.6. *See also United States v. Dupris*, 664 F.2d 169 (8th Cir. 1981) (allowing appeal under § 1291 from an order refusing "leave of court" under Fed. R. Crim. P. 48(a) to allow the United States to dismiss a criminal prosecution).

their right to compromise their dispute on mutually agreeable terms." *Id.* at 88.

Although these findings of irreparable harm were made in *Carson* to determine the availability of appeal under § 1292(a)(1) from the refusal to enter an injunctive settlement, they equally satisfy the requirements for review of monetary settlements under the collateral order rule. The purpose of the collateral order rule is to enable appellate review of pre-trial orders "affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985). This rule allows the appeal of orders which "determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

To determine whether an order is appealable under the collateral order doctrine because it has irrevocably disposed of significant rights, the Court has defined three criteria that must be examined:

> "[T]he order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment."

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote omitted). *See Van Cauwenberghe v. Biard*, —— U.S. ——, ——, 108 S. Ct. 1945, 1949 (1988).

The Court in *Carson* addressed each of these factors during the course of its § 1292(a)(1) analysis. First, the Court found that the order refusing to allow the settlement conclusively determined the "disputed question," because, as in this case, it "effectively ordered the parties to proceed to trial" rather than allowing them to resolve

their dispute on the terms they considered appropriate. *Carson*, 450 U.S. at 87. Second, the Court also made clear that the question of the reasonableness of a settlement is distinct from the merits of the case. In reviewing settlements, courts "do not decide the merits of the case or resolve unsettled legal questions," and, indeed, appellate review of an order rejecting a settlement would be more effective prior to the final determination on the merits, since it must be based on the parties' perceptions existing at the time of settlement. *Id.* at 88 n.14. Third, as previously discussed, *Carson* found that an order refusing a settlement that would be nullified if the parties are forced to trial is effectively unreviewable on appeal from a final judgment.

Thus, there is simply no reason in principle or policy to deny appealability to orders preventing the entry of settlement agreements whose terms are not sufficiently "injunctive" to fall within the scope of § 1292(a)(1). The loss of the right to settle a case and avoid the burden and risk of litigation is no less important or irreparable where the settlement consists solely of a monetary payment than it is for a settlement whose predominant effect is injunctive.

This case vividly illustrates this fact. The court below found that the consent agreement at issue, which provided for a monetary payment from GE and an agreement by GE not to seek compensation for contractual undercharges, proposes relief that is not sufficiently injunctive in character to allow appeal of the District Court's order as "an interlocutory order 'refusing' an 'injunction' under 28 U.S.C. § 1292(a)(1)." App. A at 2a.[5] The irreparable consequences of this order are, nevertheless, clear. The District Court has persisted for over two and a half years in blocking this settlement

[5] Both GE and the United States argued to the Court of Appeals that the proposed obligation to withhold claims against the Government constituted an injunctive order under *Carson*.

and will now subject GE to further discovery and a lengthy and unnecessary trial. The benefits of the proposed compromise to GE, to the United States, and to the judicial system will be irreparably lost absent an immediate appeal. Since the settlement agreement by its terms becomes "null and void" if the parties are forced to trial, App. I at 45a, there will be no way to remedy the very doubtful legality of the District Court's order after trial and final judgment.

III. The Decision Below Undermines the Important Ability of Litigants to Settle Cases Without Trial.

The availability of appeal from orders refusing to approve settlements is an important question of federal law affecting a broad range of cases. Judicial approval is required by statute or rule for settlements of private class actions and shareholder derivative suits,[6] for dismissals of federal criminal prosecutions,[7] and for the settlement or dismissal of a variety of federal civil enforcement actions, in addition to the False Claims Act itself.[8]

In an era of ever-increasing judicial dockets, it is important to encourage litigants to negotiate disposition of their disputes without trial. This goal is particularly

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[6] Fed. R. Civ. P. 23(e); Fed. R. Civ. P. 23.1.

[7] Fed. R. Crim. P. 48(a).

[8] *E.g.*, 8 U.S.C. § 1329 (1982) (requiring consent of court and statement of reasons for any settlement, compromise or discontinuation of proceedings for violation of immigration laws); 15 U.S.C.A. §§ 16(e), (f) (West Supp. 1988) (requiring courts, before entering antitrust consent judgments proposed by the United States, to determine that entry is in the "public interest"); 15 U.S.C. § 45(m)(C)(3) (1982) (requiring court approval of compromise or settlement of unfair competition actions by Federal Trade Commission); 30 U.S.C. § 820(k) (1982) (requiring court approval for compromise, mitigation or settlement by Secretary of Labor of penalty assessment which has become a final order of Federal Mine Safety and Health Review Commission).

important in the kinds of large and complex cases that, for one reason or another, require some form of judicial approval before the settlement becomes effective and the case is dismissed.

The policy against "piecemeal appeals" reflected in the final judgment rule of § 1291 actually argues in favor of immediate appeal of a district judge's order rejecting such a settlement. As the present case pointedly illustrates, it is far more efficient for the judicial system to entertain an immediate appeal that may completely resolve the dispute rather than to require extensive discovery and a full trial before the settlement issue—and others—may reach the appellate court.

IV. Immediate Appeal of Orders Rejecting Settlement in False Claims Act Cases Is Necessary to Avoid Irremediable Interference with the Government's Prosecutorial Discretion.

A number of appellate decisions—including one by the Sixth Circuit itself—have recognized that the availability of appeal from orders rejecting settlements and dismissals is particularly important in Government law enforcement actions in order to protect the Government's prosecutorial discretion against unwarranted interference. The decision below denying appeal under § 1291 fails to recognize the distinct factors militating in favor of appeal under the collateral order rule presented by Government law enforcement actions.

As the Second Circuit suggested in *Seigal v. Merrick*, 590 F.2d 35, 38-39 (2d Cir. 1978), there may be a need in private class actions or derivative suits to protect from premature appellate intervention the trial court's discretion to mediate the interests of a large number of vicariously represented persons.[9] In a Government enforce-

[9] The decision in *Seigal* denying appeal under § 1291 stressed the need to protect from appellate interference the necessary role of the

ment action where only the interests of the United States are at stake, however, the role of the trial court in reviewing a settlement and dismissal is, at best, minimal, and the need for appeal to prevent unwarranted judicial interference with the Government's enforcement responsibilities is correspondingly great.[10]

The Second Circuit itself has recognized, therefore, that the collateral order analysis for an order refusing a settlement of a Government enforcement action raises special factors that may not be present in the settlement of a private class action or derivative action. In *Donovan v. Occupational Safety and Health Review Commission*, 713 F.2d 918, 923 (2d Cir. 1983), the Second Circuit distinguished its ruling in *Seigal* in determining whether

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trial court in settlement review "because of the vicarious representation involved" in the shareholder suit, which may require the trial court to use the disapproval of a compromise "to edge the parties toward more equitable terms." 590 F.2d at 37, 39.

[10] Whether represented by the Department of Justice or a *qui tam* plaintiff, only the interests of the United States are at issue in a False Claims Act suit. Though a proper *qui tam* plaintiff may ultimately have a derivative claim to part of the recovery achieved for the United States, he cannot represent the United States once the Department of Justice has entered the case or prevent the Department of Justice from resolving the interests of the United States by settlement or dismissal. *See* 28 U.S.C. §§ 516-19 (1982) (vesting responsibility in the Attorney General to represent the litigation interests of the United States). *Cf. Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868) (finding that informer entitled to part of proceeds from property confiscated for the United States did not have a vested interest prior to judgment allowing him to prevent dismissal by the Attorney General).

While the 1986 amendments to the False Claims Act suggest that the *qui tam* plaintiff may object to the Government's dismissal or settlement of a False Claims Act case, 31 U.S.C. § 3730(b)(1), (2) (Supp. IV 1986), this is a procedural right only and does not create any substantive interest different from that of the United States. *Cf. Donovan v. Occupational Safety and Health Review Comm'n*, 713 F.2d 918, 927 (2d Cir. 1983) (procedural right to party status does not create substantial entitlement to contest settlement).

an order by the Occupational Safety and Health Review Commission rejecting a settlement between the Secretary of Labor and an employer falls within the collateral order exception to the "final order" requirement of 29 U.S.C. § 660(b) (1982). Quoting from the similar determination of the Third Circuit in *Marshall v. Oil, Chemical and Atomic Workers International Union*, 647 F.2d 383, 387 (3d Cir. 1981), the court found that the Commission's order rejecting the settlement is appealable because it interfered with the prosecutorial authority of the Secretary:

> "[W]e are presented with a serious and unsettled question which is too important to be denied review: the power of the Secretary to settle a case as the exclusive prosecutor of the Act. We think it is readily apparent that the Commission's order is final within the meaning of *Cohen* [*v. Beneficial Industrial Loan Corp.*] and that this court should assume jurisdiction to preserve rights that would otherwise be lost on review from a final judgment."

713 F.2d at 923.[11] Indeed, the Sixth Circuit itself found that a Commission order interfering with the prosecutorial authority of the Secretary by preventing the Secretary from withdrawing an OSHA citation and terminating its prosecution, which a labor union sought to pursue, is "too important to be denied review" and is appealable under the collateral order rule of *Cohen*. *See Marshall v. Occupational Safety and Health Review Commission*, 635 F.2d 544, 548-49 (6th Cir. 1980).

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[11] Other courts of appeals have similarly found that Commission orders preventing the Secretary from entering a settlement are appealable as collateral orders. *See Donovan v. Int'l Union, Allied Indus. Workers*, 722 F.2d 1415, 1417-18 (8th Cir. 1983); *Donovan v. United Steelworkers of America, AFL-CIO*, 722 F.2d 1158, 1160 (4th Cir. 1983); *Donovan v. Oil, Chem., and Atomic Workers Int'l Union*, 718 F.2d 1341, 1344-45 (5th Cir. 1983); *cert. denied*, 466 U.S. 971 (1984).

Similarly, in *United States v. Dupris*, 664 F.2d 169, 172-74 (th Cir. 1981), the Eighth Circuit allowed appeal under § 1291 of orders refusing to grant the Government permission under Fed. R. Crim. P. 48(a) to dismiss a criminal action, recognizing that significant separation of powers issues are implicated by such an order. *See also United States v. Cowan*, 524 F.2d 504, 505 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (allowing consideration on appeal under § 1291 of an order refusing dismissal under Rule 48(a) in conjunction with an order appointing a special prosecutor).

The Government's efforts to settle a civil suit under the False Claims Act should be treated the same way. As this case illustrates, judicial refusal to allow a settlement or dismissal of law enforcement proceedings by the United States will inevitably present serious questions of constitutional dimension concerning the proper scope of judicial and executive discretion. As Chief Justice Rehnquist, writing for the Court, declared in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985):

> "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. [citations omitted] This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement."

This "absolute discretion" is compelled in part by Article II of the Constitution "inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.' " 470 U.S. at 831-32. The Chief Justice had earlier made clear that the same analysis should apply to prevent judicial rejection of Government decisions to settle litigation. *See* opinion (joined by then Chief Justice Burger and Justice White)

dissenting from a summary affirmance of the settlement in *Maryland v. United States*, 460 U.S. 1001, 1004 (1983).[12] *See also In re International Business Machines Corp.*, 687 F.2d 591, 602 & n.9 (2d Cir. 1982) (noting but not reaching the Government's argument that judicial interference with an executive branch decision to dismiss a case raises separation of powers and Article III problems).

Unless an order rejecting the settlement or dismissal of a law enforcement action brought by the United States may be appealed as a final collateral order, there is no effective appellate remedy for a district court's unlawful interference with the Government's prosecutorial decisions (except, perhaps, through the extraordinary writ of mandamus). Such interference should, of course, be very unusual. The courts of appeals have concluded that, by virtue of the separation of powers doctrine, a trial court cannot constitutionally deny a prosecutor's motion to dismiss under Rule 48(a) with the possible exception "in extremely limited circumstances in extraordinary cases . . . when the prosecutor's actions clearly indicate a 'betrayal of the public interest.'" *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. Unit A Oct. 1981) (en banc) (quoting *United States v. Cowan*, 524 F.2d 504, 514 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)).[13] These

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[12] At issue in that case was judicial review of the Government's settlement of its antitrust action against American Telephone & Telegraph Co. under the Antitrust Procedures and Penalties Act, 15 U.S.C.A. §§ 16(b-h) (West Supp. 1988). The dissenting Justices viewed the district court's role in review of that settlement as constitutionally infirm despite the substantial impact of the settlement on the interests of non-parties. Where, as in a False Claims Act case, only the financial interests of the United States are at issue, the constitutional limits on judicial power to reject the Executive's settlement are even more clear.

[13] *See Dupris*, 664 F.2d at 175; *Cowan*, 524 F.2d at 513. In *Rinaldi v. United States*, 434 U.S. 22, 29-30 n.15 (1977), this Court declined to determine whether a court would have discretion under

constitutional principles should apply equally in a civil enforcement action by the United States and should make a judicial denial of a Governm.nt dismissal or settlement a rare occasion. When, however, as in this case, the district judge issues such an order, the clash of judicial and executive power may be serious and irremediable, absent appeal under § 1291.

Although district judges rarely interfere with the Government's decision to settle and dismiss a case, the risk illustrated by this case is real and growing. The 1986 amendments to the False Claims Act not only encourage private citizens to initiate actions in the name of the United States but also allow them to object to settlements even after the Justice Department has entered the case. There is, therefore, a heightened danger that settlements achieved by the Justice Department will be unlawfully blocked, as in this case, by district judges and private parties who disagree with the prosecutorial judgment of the Justice Department.[14] According to recent Department of Justice statistics, private "relators" have filed at least 75 *qui tam* actions under the False Claims Act just since its 1986 amendments, and the Justice Department has asserted control over many of them. *See* Daily Report for Executives (BNA) No. 132 at A-15 (July 11, 1988). The Justice Department's abiilty to assume effec-

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Rule 48(a) to refuse to enter a dismissal even if the prosecutor acted in bad faith.

[14] Prior to its 1986 amendment, the Act stated, consistent with constitutional principles, that, "[i]f the Government proceeds with the action, the action is conducted *only* by the Government." 31 U.S.C. § 3730(b)(3) (1982) (emphasis added). Under amendments enacted nearly one year after the parties reached and filed their settlement in this case, the Government is given "the primary responsibility for prosecuting the action" if it enters the case, 31 U.S.C. § 3730(c)(1) (Supp. IV 1986), but the court is apparently allowed to consider objections that the private party who initiated the action may interpose to a settlement reached by the Government. *See* 31 U.S.C. § 3730(c)(2)(B) (Supp. IV 1986).

tive control of those cases and negotiate appropriate settlements will be seriously jeopardized if district judges may reject those settlements without practical appellate review.

CONCLUSION

The appealability under § 1291 of an order refusing settlement and dismissal is a relatively straightforward but important and recurring question. As the Court recognized in granting certiorari in *Carson*, this is the type of question that the Court should answer. Although the existence of a narrower ground for decision allowed the Court to defer answering it then, the Court should take this occasion to decide it.

Accordingly, the Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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August 1, 1988

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

88-3171; 88-3264

JOHN MICHAEL GRAVITT,
Bringing This Action on Behalf of
The United States Government,
Plaintiff-Appellee,
Cross-Appellant,

vs.

GENERAL ELECTRIC COMPANY,
Defendant-Appellant,
Cross-Appellee.

[Filed May 3, 1988]

ORDER

Before: MERRITT and BOGGS, Circuit Judges and PECK, Senior Circuit Judge.

The United States ("the government") and General Electric (G.E.) filed separate notices of appeal in this defense contractor fraud action from the district court's order dated January 22, 1988. That order refused to adopt the report and recommendation of the Magistrate which recommended acceptance of a proposed settlement agreement. The *Qui tam* plaintiff has filed a motion to dismiss both appeals. The government and G.E. oppose that motion.

The basis for the motion to dismiss is that the order appealed from is not final for purposes of 28 U.S.C. § 1291. The refusal to adopt a settlement agreement is an interlocutory order which is neither a "colalteral" order under 28 U.S.C. § 1291, nor is it an interlocutory order "refusing" an "injunction" under 28 U.S.C. § 1292 (a)(1). *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). *See E.E.O.C. v. Pan American World Airways, Inc.*, 796 F.2d 315, 318 n.7 (9th Cir. 1986) (per curiam) *cert. denied* 107 S.Ct. 874 (1987); *see also United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348 (6th Cir. 1986).

It is ORDERED that the motion to dismiss be granted as to both appeals 88-3171 and 88-3264.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

JOHN MICHAEL GRAVITT,
Plaintiff,

v.

GENERAL ELECTRIC CO.,
Defendant.

[Filed Jan. 22, 1988]

ORDER

This matter is before the Court under the following circumstances. John Gravitt, relator herein, brought action against the General Electric Company asserting that there had been substantial overcharges against the United States. On December 13, 1985 the United States represented by the Department of Justice and the General Electric Company entered into a tentative settlement of all claims. This matter was referred to the United States Magistrate (Doc. 31) with instructions to inquire into such settlement. On August 24, 1987 the United States Magistrate filed a Report and Recommendation (Doc. 88) recommending that the Court approve such settlement. On December 18 and 21, 1987 this Court held a hearing at which time evidence and testimony was pre-

sented and counsel argued their respective positions for approximately three and one-half hours.

This case turns upon 31 U.S.C. § 3729. A critical and perhaps controlling question to be answered is the retroactive effect of amendments to that section signed into law on October 27, 1986. The amended statute provides in part: "Any person who knowingly presents or causes to be presented to an officer . . . of the United States government . . . a false or fraudulent claim for payment or approval . . . . is liable to the United States government for a civil penalty of not less than Five Thousand Dollars and not more than Ten Thousand Dollars plus three times the amount of damages which the government sustains because of the act of that person . . . ." On the same date there likewise became effective an amendment to 31 U.S.C. § 3731 which provides in part as follows: "In any action brought under § 3730 the United States shall be required to prove all essential elements of the cause of action including damages by a preponderance of the evidence . . . ."

Section 3731 prior to amendment did not speak to the level of proof. However, the United States Court of Appeals for the Sixth Circuit in construing the False Claims Acts required that allegations in a civil action be proven by showing "specific intent to defraud" the United States by "clear, unequivocal, evidence. *United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States v. Ueber*, 299 F.2d 310, 314-15 (6th Cir. 1962).

While federal appellate courts are yet to address the issue of retroactive application of the 1986 amendments to the False Claims Act, other federal district courts have reached differing conclusions on the issue. *See United States ex rel. Boisvert v. FMC Corporation*, No. 86020163 (N.D. Cal. September 9, 1987) (holding that the 1986 amendments may not be applied retroactively to cut off a defense which existed under the old law);

United States v. Bekhrad, 672 F. Supp. 1529 (S.D. Iowa 1987) (strictly construing statute to apply prospectively only); *United States v. Hill*, MCA No. 84-2144-RV (N.D. Fla. November 12, 1987) (holding that retroactive application of amendments will not result in manifest injustice). In a well-reasoned opinion in *Hill*, Judge Vinson applied the well-settled principle of statutory construction enunciated by the Supreme Court in *Bradley v. School Board*, 416 U.S. 696, 711 (1974) "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory or legislative history to the contrary." After careful consideration of the facts in the present case, the Court finds that retroactive application of the 1986 amendments to the False Claims Act does not result in a manifest injustice. Moreover, the Court agrees with Judge Vinson that concern for the public well-being militates toward the immediate application of the amendments.[1]

It was established at the hearing that the Department of Justice of the United States directed the FBI to conduct an inquiry. Special Agent John Ryan of the Cincinnati Office was assigned to this task and did conduct such an inquiry. Agent Ryan conducted a criminal investigation and concluded that based upon the evidentiary standard of "proof beyond a reasonable doubt" a criminal prosecution could not be sustained. It may be asserted that since Agent Ryan was an accountant by training that his conclusion regarding financial fraud also embraced a "clear and convincing" test of fraud. Agent Ryan was not concerned with a preponderance of evidence inquiry and insofar as the record indicates did not use that standard. The Court has no reason to question the

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[1] It is interesting to note that in *Hill*, the Government took the position that the amendments should be retroactively applied, contrary to its position in the present case.

conclusion of the FBI that there is insufficient evidence for a criminal prosecution.

In view of the extensive investigation made by the FBI and in view of the equally extensive inquiry by the United States Magistrate the Court believes that if a clear and convincing test were to be used, the settlement should be approved.

However, because this Court holds that the 1986 amendments apply retroactively to this matter, the settlement must be tested with a view toward the Government's ability to prove allegations by a preponderance of the evidence, with no requirement to show specific intent to defraud.

It is beyond doubt that there have been instances of massive fraud perpetrated by manufacturers upon the United States and in some instances either aided or overlooked by the various procuring agencies. Terms such as "a $500.00 hammer" or a "$6,000.00 coffee maker" have been used as a form of shorthand to indicate how vast the overcharges have been. This is not to determine that there was in fact fraudulent conduct in this case, but simply to indicate that matters of this sort should be approached with somewhat more caution then they might have been approached fifteen years ago.

The conduct of the Department of Justice in this matter bears some inquiry. There isn't a Judge in the United States who has not at some time been confronted with a litigant, usually *pro se*, who describes a conspiracy so vast as to include the entire governing structure of the United States. Great expenditures of time, energy and money are frequently required to demonstrate that the assertion is either out of ignorance, a spirit of revenge by a disgruntled former employee, or the product of paranoia. It is entirely possible that the Department of Justice approached this case in the first instance with the same view in mind. That initial view is excusable. The

subsequent conduct of the Department of Justice is not. It must have developed early on that Mr. Gravitt does not fit the customary pattern of the conspiracy alleging litigant and even more important his counsel is a highly respected and exceedingly competent member of the bar of this Court. Regrettably, the legal profession has its share of "scavengers"—those attorneys who lurk on the edge of propriety and who will commence meritless litigation solely for the purpose of extracting a nuisance value settlement. Such acts approach extortion and contribute to the general public disdain for our profession. Plaintiff's counsel, however, is demonstrably a very competent, skilled and effective lawyer. That if nothing else should have convinced the Department of Justice that here was an ally to be encouraged, who was willing to relieve the Department of Justice of the expenditure of manpower and money in conducting appropriate discovery. For reasons that never have been made clear, the Department of Justice rather than welcome the assistance of plaintiff and his counsel, took every step possible to frustrate their participation. The Department of Justice took no deposition, interviewed no witness and instead confined its efforts to opposing all attempts by plaintiff's counsel to conduct appropriate discovery.

A specific instance deals with an official of the General Electric Company whom plaintiff wishes to depose. That witness refused to answer asserting the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution. In response to direct questions by the Court, counsel for the United States admitted that there was no criminal prosecution pending nor was any contemplated out of the facts in this case. Despite the lack of such proceedings the United States continues to refuse to immunize that official and thereby enable the plaintiff to proceed with discovery. This is not to suggest that the Court has determined that simply because a person has asserted a Fifth Amendment

right against self-incrimination, that such is evidence of guilt. Not so. This event has been cited solely to point out the remarkable lack of cooperation given by the Department of Justice.

The Department of Justice and the General Electric Company propose to settle all claims by the payment of $234,000.00. In light of the provision in the 1986 amendments for increased penalties, a lesser burden of proof and no requirement for proof of specific intent, the Court determines from the totality of the proceeding thus far that such a settlement is inadequate. Therefore the Court rejects the Report and Recommendation of the United States Magistrate and this case is hereby returned to the trial docket.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CASE NO. C-1-84-1610

UNITED STATES *ex rel.*
JOHN MICHAEL GRAVITT,
Plaintiff

v.

GENERAL ELECTRIC COMPANY,
Defendant

REPORT AND RECOMMENDATION

This case was originally brought by John M. Gravitt, a former General Electric (GE) employee, on behalf of the United States (US) under the *Qui Tam* provisions of the False Claims Act, 31 U.S.C. § 3730. Gravitt (now an intervenor) alleged that employees at GE's Development Manufacturing Operation (DMO), Aircraft Engine Plant, Evendale, Ohio, had engaged in a scheme to defraud the government through falsifying the number of hours worked on government contracts. DMO produces developmental jet engine hardware to support development programs at GE. It also reworks and modifies jet engine hardware and lends assistance to engineering functions and hardware design to assure that proposed parts are manufacturable. The US entered an appearance in the case on December 18, 1984, and took over its prosecution pursuant to 31 U.S.C. § 3730(b)(2) & (3). The US moved for a stay of proceedings

pending the results of a criminal investigation of GE. A stay until July 29, 1985 was ultimately granted.

A criminal investigation was conducted between November 1984 and October 1985. On October 30, 1985, the United States Attorney declined to prosecute GE. Shortly thereafter, on November 15, 1985, the date of the final pretrial conference in the civil case, the US accepted GE's settlement offer. Upon being informed that settlement had been reached, the Court cancelled the final pretrial conference and scheduled a status conference, to which Gravitt's counsel was invited. Gravitt objected to the settlement between GE and the US and claimed the case could not be settled without the Court's written approval. The US and GE claimed Gravitt had no standing to object because he was not a proper party to the case originally, and that the Court had no role in approving a voluntary settlement by the parties.

After conducting a hearing, the Court rejected the stipulation of dismissal between the US and GE and urged the parties to apply to the Court of Appeals for permission to appeal the decision in order to obtain a definitive ruling on the District Court's jurisdiction. The Court of Appeals ruled that interlocutory appeal was not appropriate and denied the parties' petitions for permission to appeal. Upon return of the case to the District Court, the Court appointed the United States Magistrate as a Special Master to conduct an inquiry to determine the fairness of the settlement agreement underlying the stipulation for dismissal. Because his status as a party in the case was in question, Gravitt moved to intervene pursuant to Fed. R. Civ. P. 24. That motion was ultimately granted.

On March 14, 1986, we ordered the US to submit a proffer, supported by affidavits and documents, detailing the factual basis for the settlement, the appropriateness of the investigation conducted in this matter, the ration-

ale that forms the basis for the computation of civil penalties, and why the settlement is in the interest of the US. GE was given an opportunity to reply to the proffer. Gravitt was given an opportunity to reply to the submissions of the US and GE. GE filed a motion requesting reconsideration of the Magistrate's order granting Gravitt an opportunity to respond. This was denied by the District Judge, who determined that Gravitt had the right to intervene in all matters germane to this action.

A briefing schedule was established regarding GE's motion for protective order and Gravitt's proposed motion to compel discovery. Following the submission of briefs, on October 3, 1986, we entered an order granting in part Gravitt's motion to compel and GE's motion for protective order. (Doc. 68). In our Order, we identified specific issues we wished Gravitt to explore in discovery, in addition to those Gravitt had identified. (Doc. 68, pp. 4-6). We granted Gravitt the right to discover documents and depose witnesses relevant to the issue of the fairness of the settlement. A schedule for conducting discovery and submitting briefs was established. Following the submission of briefs, we have spent countless hours reviewing all of the legal memoranda, depositions and exhibits.

FALSE CLAIMS ACT

In determining the fairness of the settlement agreement in this case, it is important to understand the requirements of the False Claims Act. In a case under the Act, in this circuit, the gravaman of the action is intentional fraud and misrepresentation, which the plaintiff is required to establish by "clear, unequivocal, and convincing evidence." *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962); *United States v. Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976). There-

fore, in this Circuit, the standard of proof more closely resembles that of a criminal case than a civil case.[1]

A showing of actual knowledge of the falsity of the representations is required in order to establish liability under the Act. It is not sufficient to prove that the defendant should have known the representations were false. *Ekelman*, 532 F.2d at 548. In order to recover any damages other than the statutory forfeiture penalty, plaintiff must show actual losses sustained as a result of the false claims. *United States v. Thomas*, 709 F.2d 968, 972 (5th Cir. 1983); *United States v. Klein*, 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd*, 356 F.2d 983 (3rd Cir. 1966); *Blusal Meats, Inc. v. US*, 638 F. Supp. 824, 827 (S.D.N.Y. 1986); *United States v. Di Bona*, 614 F. Supp. 40, 43 (E.D. Pa. 1984).

Proof of actual damages is not a prerequisite to recovery of a forfeiture penalty under the Act. *United States v. Miller*, 645 F.2d 473, 476 n. 4. (5th Cir. 1981); *United States v. Hughes*, 585 F.2d 284, 286 n. 1 (7th Cir. 1978); *United States v. Ridglea State Bank*, 357 F.2d 495, 497 (5th Cir. 1966). The forfeiture penalty is not dependent upon the fraudulent claim being profitable to the maker, *United States v. Silver*, 384 F. Supp. 617, 620 (E.D.N.Y. 1974), *aff'd without opinion*, 515 F.2d 505 (2d Cir. 1975), but is intended at least in part because the investigation of the claim is costly to the government. *Toepleman v. United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959). The trial court is without discretion to alter the statutory

[1] There is a difference among the federal circuit courts of appeal as to whether the standard of proof under the Act is proof by a preponderance of the evidence or by clear and convincing evidence. *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985). The Second, Sixth and Ninth Circuits as well as the Court of Claims, have adopted the clear and convincing evidence test. Other Circuits, such as the Fifth and the Eighth, have adopted the preponderance of the evidence test. *Id.* at 727-28.

amount of $2,000 per false claim. *Hughes*, 585 F.2d at 286.

FACTORS FOR DETERMINING REASONABLENESS OF SETTLEMENT

The Act sets forth the Attorney General's responsibility to "diligently" investigate a violation. 31 U.S.C. § 3730(a) (1986). The Act specifies that settlement of the action should be approved if the Court determines that the proposed settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730 (c)(2)(B). No particular standard of review is specified; however, the parties agree that the standard developed in cases concerning Court approval of class action settlements pursuant to Fed. R. Civ. P. 23 should apply.

In *Stotts v. Memphis Fire Department*, 679 F.2d 541 (6th Cir. 1982), *rev'd on other grounds*, 467 U.S. 561 (1984) and *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit discussed factors courts should consider in determining if a particular settlement is fair, reasonable and adequate. The parties agree that the following are the major factors to consider:

1) The likelihood of success on the merits balanced against the relief offered by the proposed settlement.

2) The complexity, expense, and likely duration of this litigation.

3) The stage of the proceedings and the amount of discovery completed.

4) The opinions of counsel.

5) Collusion and lack of arms-length negotiations.

6) Objections to the settlement.

7) Public Interest.

The relevancy of these and other factors will vary from case to case. *In re Art Materials Antitrust Litigation*, 100 F.R.D. 367, 371 (N.D. Ohio 1983).

POSSIBLE GROUNDS FOR CLAIMING THAT THE SETTLEMENT WAS NOT FAIR

In addition to those issues raised by Gravitt, we suggested certain areas of inquiry Gravitt's counsel should pursue to test the fairness of the settlement. *See* Doc. 68, pp. 5-6. Both Gravitt's claims and the issues raised by the Special Master are discussed below.

Forfeiture Penalty Does Not Apply To Internal Documents

Gravitt contends that a civil penalty may be imposed for each false internal time record; thus the potential recovery for the government in this case on civil penalties alone is $29,160,000. This claim is specious. In our previous Order we determined that there is no authority for assessing a civil penalty under the Act for false internal documents. Only false claims submitted to the government are the subject of civil penalties. (Doc. 68, p. 3).

Formal Civil Discovery Is Not The Exclusive Means For Detecting False Claims

Gravitt alleges that only formal civil discovery, conducted by an attorney during formal procedures such as depositions, can disclose the extent of the fraud in this case. In our previous Order, we determined that formal civil discovery was not necessary in this case, because the criminal investigation conducted by the FBI was at least the equivalent of civil discovery.[2] Furthermore, we

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[2] An example of the disadvantages of formal discovery is found in the depositions taken by James Helmer, Gravitt's counsel in this case. The transcript reveals that during these depositions, he was constantly interrupted by GE attorney Stephen Brogan, often for

found that impeachment testimony of FBI agents was the practical equivalent of impeachment by deposition. (Doc. 68, p. 4).

The Investigation Was Reasonably Limited To Activities in The DMO Shop During the Years 1981 through 1983

The investigation was reasonably limited to Gravitt's allegations. In a statement made to the US, Gravitt alleged two types of misvouchering—recording labor hours to the wrong job and recording idle time to the wrong job. (Ex. 1 to US reply, Doc. 87). Gravitt fixed the beginning of the misvouchering of idle time as early 1982 and did not fix the beginning of misvouchering of labor hours. He brought these allegations to the attention of GE in June, 1983, and GE brought them to the attention of DCAA shortly thereafter.

The investigation confirmed alterations in time records in DMO at GE's Evendale plant during the time period 1981 through 1983. It disclosed that misvouchering was instituted by Robert Kelly, who became a unit man[a]ger in DMO in 1980, and that alterations of vouchers began in 1981. Many employees of DMO were highly skilled. As the volume of work fluctuated, they experienced periods of time when there was no work to perform. In order to appear more productive and avoid being laid off, supervisors falsified and altered time records. The alterations appeared to have stopped in 1983. A review of January 1985 vouchers confirmed that the rate of altera-

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no apparent legitimate reason. The interruptions often lasted several pages of transcript. Brogan insisted that Helmer submit to questioning by Brogan before he would permit questioning the witness. Helmer, appropriately, did not respond in kind, and proceeded with the deposition. Nevertheless, a private *ex parte* interview of a witness conducted during a criminal investigation by an FBI agent specially trained in such matters would have been more effective in producing the desired information.

tions had fallen from 25% to only 3%, the latter apparently a normal rate of erroneous vouchers.

The FBI was aware of Gravitt's allegation that misvouchering occurred outside DMO, and Agent Ryan explored this possibility. However, no significant leads were developed. The investigation revealed that the motive for the misvouchering in this case was to make DMO appear more efficient to its superiors, thus discounting related misvouchering outside DMO. Although Gravitt had referred to GE newsletters expressing concern over misvouchering, it would not be unusual to find that, in a corporation the size of GE, misvouchering had occurred somewhere other than in DMO. However, that is beyond the scope of this investigation. We can find no reasonable basis in the record for investigators to believe that fraudulent misvouchering related to this case occurred outside DMO. Gravitt appears to believe that the scope of the investigation should encompass all possible allegations of misvouchering at any GE site, even though unrelated to the scheme of DMO. This is not reasonable. The settlement agreement is limited to acts of misvouchering at DMO occurring between 1981 and 1983. Thus, the US has not released GE from any claims arising outside this time period.

The Government's Review of Time Records Was Adequate

We requested Gravitt to explore through discovery why the US reviewed only 9100 of the 60,000 time records involved in this case. The evidence indicates that, prior to reviewing the records, the FBI, OSI and DCAA representatives decided that they would begin with a six month period and expand it if necessary. The sample was designed to focus on time periods most likely to reflect alterations. The selected months were chosen to be representative of each year and avoid plant shutdowns and vacations, in order to test for changes and patterns.

It was reasonable for investigators to believe that this sample would reflect the highest percentage of alterations. Because the government's position in settlement was based on the percentages obtained after analysis of a sample that presented the highest possible incidence of fraud, it was reasonable to believe that the expenditure of many hours reviewing the remaining records would only dilute the percentage of alterations and would not benefit the government's case.

Gravitt alleges the US failed to investigate why GE destroyed "thousands of relevant time records." However, the records referred to had been reviewed by GE and DCAA when Gravitt raised his claim in 1983. That review found no wrongful impact on government contracts. The more recent investigation supports the correctness of that view. At that time, thinking the matter closed, DCAA did not require GE to maintain its records beyond the normal retention period approved by DCAA. The GE Evendale Plant record retention plan complies with contractual agreements and the Defense Acquisition Regulation in effect at that time.

We also asked Gravitt to explore whether the US adequately investigated time records that were not altered, but may have been falsified in their original state. After discovery, Gravitt argued that many false records would not so indicate on their face, because either the information was falsified originally, or an accurate record was destroyed and a counterfeit substituted. Gravitt claims the investigation was deficient for failing to interview employees or take handwriting specimens to identify the authors of such records. The US claims that there was no reliable means of investigation to determine the original information on the records. Furthermore, investigators concluded that, if records were falsified in their original state, identification of them would reveal the same pattern as the altered records, thus yielding the same results when analyzed. Interviews of the hourly

employees would not aid in this investigation, because the supervisors were the ones who falsified records, as Gravitt himself acknowledged.

The FBI thoroughly interviewed supervisory officials, but were unable to specifically identify records altered in their original state. The supervisory officials admitted their roles in falsifying records. Their motives were: to prevent layoffs and keep their jobs, to mask inefficiency and idleness, to hide overruns on individual contract jobs. Therefore, we believe it was reasonable for the US to conclude that the falsification of records in their original state would follow the same pattern as the alteration of records. It was a series of random acts not designed to obtain money from the government by fraud, but to make the activities of DMO appear more efficient than they were to their superiors, thus preventing layoffs and saving jobs. No witness was able to establish that anyone above the position of unit manager had knowledge of the scheme. The scheme appeared to have been originated by Robert Kelly, a former unit manager who has since died.

In our earlier Order, we indicated that the settlement was based on 117 false vouchers, although 186 were found to be false. We asked Gravitt to explore this matter in discovery. Gravitt made no argument on this basis after discovery, and for good reason. Our statement was based on a misreading [of] the October 23, 1985 memorandum from the United States Attorney to the Justice Department recommending approval of the settlement. In that memorandum, the United States Attorney notes that 303 claims were submitted to the Air Force by DMO during the pertinent period and that 117 were false, leaving a balance of 186. There is no indication that the remaining 186 claims were found to be false; rather the contrary is indicated. Thus, there is no basis in these figures to criticize the investigation.

Gravitt also argues that the US failed to investigate properly the high levels of idle time at DMO. Employees were required to account for their time at DMO. Some of their time was non-productive; that is, they were idle while waiting for training or to perform another task. GE maintained a category to reflect this idle time, and it was charged as such, rather than as labor. Gravitt claimed that DMO employees had been charging idle time as though it were actual labor and that it had been charged to rework and modification jobs.[3] An analysis of GE records revealed that the total charges for rework and modification during the relevant period were not sufficient to absorb the amount of idle time allegedly misvouchered, thus discounting Gravitt's claim. Nevertheless, the investigators pursued the allegation. Almost half of Special Agent Ryan's time was spent on this issue.

GE supplied Ryan with its floor checks of idle time, and Ryan interviewed supervisory personnel concerning the issue. However, audit methods could not be used to measure idle time misvouchering, because it was not possible to go back in time and determine whether an individual had been waiting for tools or training on a certain occasion. There were no documents by which one could compute the number of compensable idle time hours engaged in by GE employees. Gravitt argues that idle time figures set forth in a study done after the pertinent time period could be used to estimate excessive idle time. However, this is hypothetical and would not produce proof by clear, unequivocal and convincing evidence. Idle time is not necessarily consistent over a period of time. It increases and decreases depending upon various conditions. Furthermore, Gravitt's original allegation was that idle time was fraudulently misvouchered, not that it was excessive.

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[3] Rework and modification is work performed to modify an existing part without making a new part. Making a new part from raw stock is called new make.

Investigators considered reviews of labor charges by engineers to determine if idle time was excessive, but the Assistant US Attorney believed that the results would have been speculative and not admissible evidence. The investigators traced code numbers listed on documents provided by Gravitt that allegedly reflected the shifting of idle time. They found that the contracts listed to avoid shifting idle time to were usually government contracts or Independent Research and Development (IR&D) work, and not commercial contracts. GE and the government shared the costs for IR&D work. Thus, the results of the analysis indicated that idle time costs were shifted away from government reimbursed jobs, not to them. Based on the above, we believe the US made a reasonable effort to pursue the idle time claim.

The Alteration Of Time Records
Resulted In A Loss To GE

The investigators were reasonable in believing, based on the results of the interviews conducted and the review of records, that the purpose of the misvouchering scheme was not to increase costs to the government, but to make the DMO operation appear more efficient and thus avoid layoffs. In fact, in many cases, the employees who were changing records could not distinguish a commer[ci]al job from a government job. DCAA constructed a sample and reviewed vouchers to determine any pattern of misvouchering. None was found. GE conducted a study and presented the results to Agent Ryan. It was consistent with the findings of the investigators. Ryan, who is a CPA and has conducted a number of audits and understands sampling techniques and their validity, tested the report, with the assistance of a DCAA auditor. He was satisfied with the accuracy of the report.

In connection with this study, GE had infrared photographs made to identify alterations. While the alterations on most of the sample of 9100 time records selected

by the US were readable, GE tested approximately 550 by infrared photography to insure that all time records that had alterations masking the original entry were considered. In our previous Order we suggested that Gravitt explore in discovery who performed the infrared tests and by what means the US ver[i]fied them. Submissions to the Court reveal that the infrared work was performed by three organizations: The GE Corporate Research & Development Center in Schenectady, New York; Tytell Laboratories in New York City; and Albert Lyter in Raleigh, North Carolina, using the facilities of the North Carolina State Police. Agent Ryan personally reviewed the infrared photographs and determined the records were authentic. Justice Department Attorney Terlep, who is familiar with infrared photography, also reviewed a number of the photographs and satisfied himself as to their authenticity. Agent Ryan explained that he saw no need for the government to duplicate this analysis because it was consistent with the interviews conducted and the visual analysis of the non-obliterated records in demonstrating that the pattern of misvouchering was random. In making this determination, any entries that could not be read were considered as a shift of costs to the government. This approach was reasonable.

After analyzing the time records, the investigators applied the results to the mix of work conducted at DMO. They determined that the pattern of alterations matched the pattern of contract mix at DMO. They conveyed this to GE, which prepared its own study. Gravitt claims that the investigators abandoned their conclusions in the face of untested GE information. However, the evidence before the Court reveals that the GE report was checked for accuracy by reviewing accounting codes and contracts.[4] The investigators found an error in the classification of charges to the 600 accounting series, which had

[4] For a detailed explanation of how this was accomplished see Government's Reply, Doc. 87, pp. 23-24.

been assumed to be a commercial account. It was then discovered that this series was not a commercial account, but an overhead account. This left virtually no accounts assigned to commercial contracts in DMO. Thus, the US concluded that no shifting from commercial accounts to government accounts occurred.

Gravitt also points to hypothetical studies done by investigators early in the investigation that resulted in an estimate of substantial damage to the government as a result of misvouchering at DMO. However, these estimates were based on incorrect assumptions regarding the mix of work at DMO and applied maximum idle time estimates. The facts uncovered later did not support these assumptions. Nevertheless, these hypothetical studies reveal that the investigators aggressively pursued damages, but were willing to change their original assumptions when the facts discovered did not bear them out. This is reasonable procedure.

The Pre-Gravitt Investigation Was Adequately Pursued

In our previous Order we suggested that Gravitt explore through discovery the relationship between the on-site auditors and GE. Since the government contends its auditors were aware of the altered time records before Gravitt filed his complaint, we suggested Gravitt explore why no criminal investigation or civil action was undertaken until after this case was filed.

The US claims that the original investigation by DCAA, like the instant one, resulted in finding an undercharge to the government. There was no referral to the Justice Department because there was no evidence of intent to defraud the US. Since DCAA does not have authority to impose penalties, further admin[i]strative action was unnecessary. Gravitt has implied collusion in the original audit by DCAA. However, he has produced

no facts to support that claim. To the contrary, the facts support the government's explanation. DCAA does not have authority to administer or terminate contracts, or make related determinations. That is the role of the Contracting Officer. DCAA performs an audit function. Its auditors rotate through companies and their personal success depends on the accuracy of their audit work, not whether they please contractors. Having given Gravitt authority to explore in discovery the relationship between the on-site auditors and GE, we find nothing in that relationship to support a claim of impropriety on the part of the auditors. Their actions were reasonable under the circumstances.

Gravitt's further claim that DCAA is unable or unwilling to supervise and sanction GE is not relevant to the scope of this inquiry. Suffice it to say DCAA's duties do not encompass either supervising or sanctioning GE.

The US Conducted A Thorough Civil Investigation

Gravitt alleges that the investigation was criminal only and is therefore inadequate for the purposes of a civil case. This is specious. Agent Ryan was supervised by several attorneys experienced in civil fraud matters. It was clearly a joint civil-criminal investigation. The issues in each type of case were virtually iden[t]ical—the US had to prove intent to defraud by GE in order to prevail. In the criminal case it had to be proven beyond a reasonable doubt, while in the civil case it had to be proven by clear, unequivocal and convincing evidence. In addition, damage to the government had to be proven to prevail in the civil case. The real significance of the joint criminal investigation is that the US had the unusual advantage of evidence obtained through criminal investigative techniques, such as the Grand Jury, and *ex parte* interviews of prospective witnesses by highly

skilled investigators. Therefore the fact that a criminal investigation also took place does not detract from, but rather enhances the completeness of the civil investigation.

Further Investigation Was Not Necessary

Gravitt alleges that further investigation and more careful techniques could have produced additional evidence. For example, he claims the US should have made efforts to develop a case involving individuals above the level of William Taylor, a supervisor. He criticizes the US for not granting immunity to Taylor after he invoked his Fifth Amendment rights during his depos[i]tion. There was no reasonable basis to believe individuals above the level of Taylor were involved, since the motive was to make DMO appear more efficient to higher placed GE officials. If the US had been knowingly overcharged, GE would be liable whether or not Taylor's superiors knew. As for the grant of immunity, that is not a proper action in a civil case. The criminal investigation was closed long before Gravitt deposed Taylor. Further, such a grant is in the sole discretion of the Attorney General and upon approval by the District Court.

Although there are other actions the investigators could have taken, it was not reasonable to pursue this case further. Gravitt fails to realize that many such investigations take place constantly in this District and others, that limited manpower and resources are available, and that such investigations are funded by the taxpayers of this country. This is not a private civil case where counsel can pursue a fishing expedition so long as his client can afford it. The government investigators and attorneys have a responsibility to the taxpayers to expend only the time and effort that is reasonably justified by the circumstances. In this case, they fulfilled that responsibility.

There Is No Evidence Of Collusion

This matter was originally referred to the Magistrate to investigate the fairness of the settlement because Gravitt implied collusion between the Department of Justice and GE in settling the case. After careful review of all the briefs, depositions and exhibits submitted, we can find no evidence of collusion. The investigation was conducted by four experienced Justice Department attorneys, three experienced Special Agents of the FBI, Air Force OSI investigators and DCAA auditors.

Assistant U.S. Attorney Tracy, in charge of the criminal investigation, is known to the Court as an attorney with extensive experience in criminal fraud investigations. Former Assistant U.S. Attorney Whitacre, then in charge of the civil division of the U.S. Attorney's Office, and former Assistant U.S. Attorney Cruze, both of whom supervised the civil investigation, are known to the Court as attorneys with extensive experience in civil cases, including fraud investigations. Justice Department Attorney Terlep, who participated in the investigation and agreed with the recommendation for settlement, has litigated False Claims Act cases for 10 years and has expertise in *qui tam* matters.

John Ryan, who coordinated the investigation, has been an FBI Special Agent for 21 years. Most of his career has been spent investigating economic white collar crimes similar to those alleged in this case. He has participated in cases involving detailed analysis of thousands of documents and has testified in numerous trials. Ryan testified that this was an important case, because if the government could establish fraud and successfully prosecute G.E., a nationally-known corporation, it would result in substantial publicity, which has a deterrent effect. He stated that, as the investigation progressed, the investigative team could not find the facts needed to establish intent to defraud. Ryan stated, "If you find a viable,

prosecutable case, you pursue it with vigor. If you don't, you can't. You still pursue all logical avenues until you are convinced that there is no reason to continue on with the investigation because there is no case there, and that's what happened in this case." (Ryan Depo., p. 118).

Ryan felt the investigation was very complete. Based upon the results of his investigation as well as information gleaned from a Grand Jury investigation, "I am convinced, absolutely convinced, and the more I reviewed these facts over the past weeks in preparation for this deposition, I am convinced there was never ever a criminal case. There never was any intent to defraud the United States Government and I am convinced from talking to the DCAA people, who during the past week prepared and analyzed the records, and labor vouchers that there was an underbilling." (Ryan Depo., p. 114). Although Ryan referred to criminal intent in his deposition, it was necessary for the government to prove the same intent—intent to defraud—by clear, unequivocal and convincing evidence in order to prevail in the civil case. When government counsel asked for his advice on the civil settlement proposal, Ryan stated he felt it was more than fair, because there was no major "dollar impact" on the government and because there was no intent to defraud. (Ryan Depo., p. 112).

In this case an adequate investigation resulted in facts which led government counsel to the only reasonable conclusion—there was no intent to defraud the US and no damage to the US. It was not necessary to determine each and every instance of misvouchering to make this determination, as it might have been if one were attempting to determine the amount of damage to GE. The employees who falsified vouchers did have an intent to defraud—but it was an intent to defraud GE, not the US. The False Claims Act does not provide a cause of action for the government to pursue damages caused to a pri-

vate contractor by the fraudulent acts of its own employees.

The US properly pursued the forfeiture penalties under the Act, because these penalties are intended to help the US recoup the cost of this investigation, even though the US was not damaged. *Toepleman*, 263 F.2d at 699.

ANALYSIS OF FACTORS FOR DETERMINING REASONABLENESS OF SETTLEMENT

1) THE LIKELIHOOD OF SUCCESS ON THE MERITS BALANCED AGAINST THE RELIEF OFFERED BY THE PROPOSED SETTLEMENT.

There was little likelihood of success on the merits of this case. There was no evidence to prove intent to defraud the US. Rather, the evidence indicated an intent on the part of GE employees to decieve [sic] GE. The proposed settlement permits the US to recover the statutory penalty for the highest number of false claims discovered during the investigation, even though the net result was no damage to the US. This will enable the US to recoup the costs of its lengthy investigation.

2) THE COMPLEXITY, EXPENSE, AND LIKELY DURATION OF THIS LITIGATION.

This is a complex case, involving thousands of documents. Review of the fairness of settlement alone has taken many hours. The litigation of this case would be very expensive and probably would last several weeks.

3) THE STAGE OF THE PROCEEDINGS AND THE AMOUNT OF DISCOVERY COMPLETED.

Settlement was proposed at the time a final pretrial conference was scheduled, after the conclusion of both a criminal and civil investigation and review by local Assistant United States Attorneys as well as Justice De-

partment attorneys, all of whom were experienced in civil fraud cases.

4) THE OPINIONS OF COUNSEL.

Counsel on both sides of the case believe the proposed settlement is reasonable, as does the FBI Special Agent in charge of the investigation. The Intervenor does not believe the proposed settlement is reasonable.

5) COLLUSION AND LACK OF ARMS-LENGTH NEGOTIATIONS.

There is no evidence of collusion. Although GE cooperated fully with federal investigators, there is no indication that dealings between the parties were anything but arms-length. GE should not be criti[ci]zed because it cooperated with the government—it should be congratulated for its attitude.

6) OBJECTIONS TO THE SETTLEMENT.

Objections to the settlement made by Intervenor Gravitt, as well as questions raised by the Special Master, are set out in detail above. All objections have been carefully reviewed and resolved in favor of the settlement.

7) PUBLIC INTEREST.

No public interest would be served by refusing to accept the proposed settlement. The result of such action would be spending substantial amounts of the taxpayer's funds on litigation that is highly unlikely to produce as satisfactory a result for the US as does the proposed settlement. On the other hand, the proposed settlement is in the public interest because it would allow the US to recoup the costs of its investigation, and it would act as a deterrent measure, encouraging GE and other government contractors to more carefully supervise employees responsible for vouchering, or face forfeiture penalties even though the US suffered no damage. Government

representatives, well aware of the misvouchering problems at GE, are following these matters through audit and contract supervision.

CONCLUSION

After considering the detailed proffers of all the parties, after authorizing discovery by Intervenor and suggesting additional issues that Intervenor pursue, and after reviewing the post-discovery briefs of the parties, depos[i]tions of witnesses, and all of the documents submitted, it is our conclusion that the US diligently investigated the violation alleged by Gravitt, and that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

IT IS THEREFORE RECOMMENDED THAT

The settlement of this action be approved.

Date: 8-24-87 /s/ Robert A. Steinberg
ROBERT A. STEINBERG
United States Magistrate

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-8301, 86-8302, 86-8303

UNITED STATES, *ex rel.*,
JOHN MICHAEL GRAVITT,
Petitioners,
Cross-Respondents,

v.

GENERAL ELECTRIC COMPANY,
Respondent,
Cross-Petitioner.

[Filed Feb. 7, 1986]

ORDER

BEFORE: KEITH, MARTIN, and KRUPANSKY, Circuit Judges.

The United States ("the government"), General Electric Co. ("GE") and qui tam plaintiff John Gravitt filed separate petitions in a defense contractor fraud suit for permission to appeal the district court's order of January 8, 1986. The order rejected a stipulation of dismissal between the government and GE, whereby GE would pay $234,000 for 117 violations of the False Claims Act, 31 U.S.C. § 3729 et seq.

Upon review of the petitions, the Court concludes that interlocutory appeal under 28 U.S.C. § 1292(b) is not

appropriate. *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1369 (6th Cir. 1978) (en banc); *Cardwell v. Chesapeake & O. R.R. Co.*, 504 F.2d 444, 446 (6th Cir. 1974). Accordingly,

It is ORDERED that the petitions for permission to appeal under 28 U.S.C. § 1292(b) are denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

JOHN GRAVITT, *et al.*,
Plaintiffs,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

[Filed Jan. 9, 1986]

ORDER

This matter is before the Court for consideration of a Stipulation of Dismissal signed by an Assistant United States Attorney for the Southern District of Ohio and by counsel for The General Electric Company. This is a matter that was initially brought pursuant to 31 U.S.C. § 3729. John Michael Gravitt, a former employee of the General Electric Company at Ev[e]ndale, Ohio brought action pursuant to the False Claims Act, 31 U.S.C. § 3730. Mr. Gravitt contended that the United States was overcharged by General Electric Company. Mr. Gravitt brought his action on November 26, 1984. On December 18, 1984 the United States entered its appearance in accordance with Subsection (B)(3) of 31 U.S.C. § 3730.

There was attached to the Stipulation of Dismissal submitted to the Court on December 13, 1985 a Settlement Agreement wherein General Electric agreed to pay the sum of $234,000.00. Counsel for Mr. Gravitt asserts that such settlement is grossly inadequate and suggests that

appropriate settlement would be in the neighborhood of $24,000,000.00. It is the position of the United States that this Court has no jurisdiction since Subsection (B)(4) removes Mr. Gravitt as a party in interest.

An examination of 31 U.S.C. § 3730 reveals an ambiguity which this Court is unable to resolve. Subsection (B)(1) provides for the bringing of a civil action by any individual in any District Court of the United States and provides specifically: "An action may be dismissed only if the Court and the Attorney General give written consent and their reasons for consenting."

Subsection (B)(4) provides: "Unless the Government proceeds with the action the Court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought."

This Court is now faced with a dilemma. If the interpretation by the United States of Subsection (B)(4) is correct, this matter must be dismissed since there is evidence that John Michael Gravitt did provide the evidence or information upon which the Government has acted.

On the other hand, if this Court has jurisdiction under Subsection (B)(1) the requirement of consent must imply informed consent and that is totally lacking. The Court has no information at this time to decide that question.

If the jurisdictional question is disposed of, this Court proposes to appoint a Special Master who will conduct thorough evidentiary hearings to determine whether or not the proposed settlement is adequate. In the absence of a determination of such jurisdictional question, the time and expense to the parties and to a Special Master might be expended uselessly.

Accordingly, the Stipulation of Dismissal (Doc. 26) is hereby set aside. The Court finds that this is not an appealable order pursuant to 28 U.S.C. § 1292(B).

The Court is further of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal therefrom would materially advance the ultimate termination of this litigation.

The Court urges the parties to apply to the United States Court of Appeals for the Sixth Circuit for permission to appeal from this Order.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

JOHN GRAVITT, *et al.*,
Plaintiffs,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

[Filed Feb. 27, 1986]

ORDER

This matter is before the Court under the following circumstances: On December 13, 1985 a hearing was held at which arguments regarding this Court's jurisdiction were presented. Pursuant to such hearing this Court determined that it had jurisdiction and that a proposed settlement of this matter was unfair. On January 8, 1986 this Court declined to approve the settlement offered and urged the parties to appeal such Order to the United States Court of Appeals for the Sixth Circuit (Doc. 27).

On February 7, 1986 the United States Court of Appeals declined to consider the parties separate petitions for permission to appeal and returned this matter to the District Court (Doc. 29). In accordance with the fore-

going the Court determines that it has jurisdiction to consider the fairness of the proposed settlement and to conduct an inquiry therein. The Court does designate United States Magistrate Robert A. Steinberg as a special master pursuant to Rule 53, Fed. R. Civ. P., and does direct him to conduct such inquiry as he may deem appropriate including by way of example only, conduct hearings, examine documents, take testimony of witnesses and to do all other things he deems necessary in order that he might issue a Report and Recommendation to this Court on such proposed settlement.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

JOHN MICHAEL GRAVITT
BRINGING THIS ACTION ON BEHALF
OF THE UNITED STATES GOVERNMENT,
Plaintiff,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

[Filed May 6, 1986]

ORDER

This matter is before the Court on Qui Tam plaintiff Gravitt's Motion to Intervene (doc. no. 33), which is opposed to by the Government in its Motion for Reconsideration of the Magistrate's Order (doc. no. 36).

Upon consideration of all relevant information before it, the Court holds that Qui Tam plaintiff Gravitt has the right to intervene in all matters germane to this action.

This case is hereby remanded to the United States Magistrate for further proceedings in accordance with this Court's Order of February 27, 1986 (doc. no. 31).

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
Chief Judge
United States District Court

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

JOHN M. GRAVITT, *et al.*
Plaintiffs,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

AFFIDAVIT OF PAUL DONALD LYNCH

I, Paul Donald Lynch, do state under oath:

1. During the period May 1982 to April 1985, I was Commander of the Air Force Plant Representative Office (AFPRO) at the General Electric Company's Evendale, Ohio plant.

2. In that capacity, I was responsible for ensuring GE's compliance with cost, schedule and performance standards for all government contracts at the Evendale plant.

3. I supervised a staff of one hundred government employees, whose function it was to track performance on existing contracts and to gather data on standards to be used in negotiating new government contracts with GE.

4. The AFPRO employees work under a separate authority from the Defense Contract Audit Agency.

5. Mr. George Krall, Vice President and General Manager of the General Electric, Aircraft Engine Business Group, Evendale Production Division was the person at

GE with whom I dealt regarding the carrying out of the AFPRO responsibility to oversee contract compliance at GE. In that regard, I had frequent spoken and written communications with Mr. Krall.

6. A recurring topic of our communications was excessive idle time by hourly workers. These abuses included charges of idle time to overhead and charges to direct labor on daily labor vouchers.

There are two basic causes of idle time. The first is simply a worker not working when he should be. The second, is the result of lack of material, equipment, inspectors or other resources under the control of the company. The second is properly charged as overhead (paid in part by the government), but excessive amounts reflect a lack of effective production control.

In many cases it was clear that the idle time was the result of poor work ethic; in others it was difficult to determine the cause. Since both types of idle time were the responsibility of the company and both resulted in added costs to contracts, I insisted that the company eliminate both.

I repeatedly brought these problems to Mr. Krall's attention during the period of time I served as Commander of AFPRO at GE, Evendale. (See letters to George Krall dated March 6 and December 17, 1984—Exhibits 1 and 2). I made many inspections of the plant including the DMO shop. On some occasions, I was accompanied during my inspections by George Krall.

As was my practice, I informed my superiors of my findings. I also informed the negotiators for the government agencies buying from GE Evendale. These findings were, in fact, used by them and by me in negotiating contracts with GE Evendale.

7. My concern for the abuse of idle time and allegations of misvouchering led me to have a formal "idle

time" study done in a part of the plant known as Comp[o]nents Manufacturing. While DMO was not a part of Comp[o]nents Manufacturing in 1984, I believe the results of the study are typical of other parts of the plant, including DMO. (See Exhibit 3—Survey of Worker Productivity in Comp[o]nents Manufacturing dated March 6, 1984). I informed GE of my findings by letter dated March 28, 1984 (Exhibit 4). I also informed my superiors of my findings. (See buckslip to General Stukel and reply from General Stukel—Exhibits 5 and 6).

In addition, I distributed the results of my idle time findings to the negotiators for the government agencies buying from GE Evendale. (See distribution instructions on letter dated March 28, 1984—Exhibit 4, and Memorandum dated August 22, 1984—Exhibit 7). The findings were in fact used by them in negotiating contracts with GE Evendale. (See Memoranda from the Department of the Navy dated September 25, 1984—Exhibit 8, and from the Department of the Air Force dated October 19, 1984, —Exhibit 9).

8. In addition to providing my findings to government contract negotiators, I personally briefed the Commanders of the main buving agencies at the San Antonio Air Logistics Center, Oklah[o]ma City Air Logistics Center and the Aeronautical System Division at Wright Patterson Air Force Base, Dayton, Ohio. I briefed these Commanders and negotiators about every quarter so that they would be aware of issues relevant to the negotiations, including labor problems and idle time.

Therefore, the government negotiators were prepared with their own views of the problem of idle time and did not need to accept GE's idle time/productivity figures during negotiations involving direct labor or overhead expenses.

I also took an active role in negotiating overhead rates on government contracts at the GE Evendale plant.

9. I was aware that during 1983 DCAA initiated an audit regarding suspected misvouchering problems in engineering. This audit failed to substantiate the allegations. (See letter dated January 9, 1984 with attached appendices—Exhibit 10). The engineering audit was conducted prior to the letter by Mr. Gravitt to Brian Rowe. In addition, my superiors and I were aware, during 1983, the GE had conducted its own internal audit of Mr. Gravitt's allegations that costs were being shifted from commercial contracts to government contracts in DMO. (See Exhibit 10 and letters from GE to Col. Lynch dated November 2, 1983 and November 16, 1983—Exhibits 11 and 12). I was advised th[a]t GE's internal audit showed that misvouchering had occur[r]ed. Based upon interviews, the reason for the misvouchering was determined to be a desire to meet internal cost and efficiency measurements within DMO. The auditors determined that the misvouchering had resulted in a net underbilling to the government. GE implemented measures to safeguard the integrity of the labor vouchering system as a result of the audit findings. (See letter from GE to Col. Lynch dated November 21, 1983—Exhibit 13, and letter and attachment from GE to General Stukel dated December 5, 1983—Exhibit 14). I was also aware that DCAA had reviewed and ultimately concurred in GE's findings that the result of misvouchering was an underbilling to the government on the contracts involved. (Exhibit 10). I had been routinely apprised of the audits during 1983 by Mr. Robert Einfalt, Resident Auditor, DCAA.

10. As the preceding paragraphs demonstrated, I was aware of the practice of misvouchering idle time at the GE plant in general, and in DMO specifically, long before October 1984 when Mr. Gravitt filed his lawsuit. I also made my findings known to GE and to the government negotiators on a regular basis.

11. I first learned of Mr. Gravitt's allegations concerning the transfer of labor charges from one job to

another in the summer of 1983. I was told about Mr. Gravitt's letter to Brian Rowe by George Krall at that time. As soon as I learned of this allegation, I notified my Commander, General Stukel. I also discussed the matter with a representative of DCAA, who, as I recall, was already aware of the allegation. I also advised Mr. Jack Spellman, Primary Administrative Contract Officer, who oversees and makes the final decisions for the government on all government contracts negotiated at the GE Evendale plant.

12. I first saw a copy of Mr. Gravitt's June 26, 1983 letter to Brian Rowe shortly after he filed his lawsuit in October 1984. At that time, I requested and obtained a copy from Brian Rowe.

13. Although I received the letter in October of 1984, I was already aware of the allegations contained therein as a result of my discussions with George Krall and Robert Einfalt during 1983. As I stated above, I had been aware of the facts giving rise to Mr. Gravitt's idle time and idleness misvouchering allegations since May 1982, when I took responsibility for contract compliance at the GE Evendale plant.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 14 April 1986.

/s/ Paul Donald Lynch
PAUL DONALD LYNCH

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN BERNARDINO)

On April 14, 1986, before me the undersigned, a Notary Public for the State of California, personally appeared Paul Donald Lynch, personally known by me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

/s/ Joyce F. Jensen
JOYCE F. JENSEN
Notary Public

APPENDIX I

SETTLEMENT AGREEMENT

This agreement is entered into between the United States of America, acting through the United States Department of Justice and the General Electric Company (General Electric), to settle certain civil claims arising out of certain contracts with agencies of the United States to produce aircraft engines, parts and accessories. A list of the contracts relevant to this agreement is appended hereto as Exhibit A. This agreement is entered into in light of the following facts:

1. On or about October 26, 1984, John M. Gravitt, a former employee of the General Electric Company, Aircraft Engine Business Group, Evendale Plant, Evendale, Ohio, instituted a civil action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730. In his complaint Gravitt alleged that, at least during his period of employment, from June 23, 1980 until June 30, 1983, and perhaps longer, certain employees of a shop within the plant known as Development Manufacturing Operation (DMO), under instructions from their supervisors, had engaged in a scheme to falsify labor vouchers so as to divert charges for labor away from commercial contracts, and to charge that labor to the account of various Government contracts. Gravitt also alleged that charges for idle time which should properly have been applied to overhead were applied instead to Government contracts. Gravitt alleged that the Government suffered monetary damage as a result of the scheme.

2. On or about December 18, 1984, The United States entered its appearance in Mr. Gravitt's *qui tam* action, and took over its prosecution.

3. General Electric denies the allegations in Gravitt's complaint and affirmatively represents that the allocation of time charges described in the complaint and in Mr.

Gravitt's statement attached to the complaint were random in nature, not intended to cause financial loss to the United States, but instead appeared to be designed to meet internal production budgets and, in fact, its monthly billings to the Government on the contracts involved, resulted in net undercharges to the United States.

4. The United States and General Electric now mutually desire to reach a settlement of this matter without further litigation.

5. The parties acknowledge that the questions of the necessity of the Court's consent to this agreement and of Gravitt's status as a proper relator and of his compensation are now pending before the court.

NOW THEREFORE, in consideration of the mutual promises made herein, it is hereby agreed as follows:

A. General Electric agrees to pay $234,000 in settlement of the claims alleged in the complaint referred to above and as further defined in this agreement. Payment shall be made to the United States within five days after all judicial proceedings pertaining to the approval of this settlement have concluded, including the exhaustion of all appeals. If, after all judicial proceedings pertaining to the approval of this settlement agreement, including the exhaustion of all appellate review relating to that issue, this settlement agreement has been disapproved, or if, prior to the exhaustion of any appeal on the matter of the approval of this settlement, General Electric is required to go forward with a trial on the merits of this case, this settlement agreement shall be null and void. Any amounts ordered by the Court to be paid out of the proceeds of this settlement to Mr. Gravitt shall be the responsibility of the United States.

B. The United States agrees that in consideration for its receipt of the aforementioned payment by General Electric it will never assert any claim, adjustment, or setoff, or institute any civil action against General Elec-

tric Company, or its present or former officers or employees which is based, in whole or in part, upon the transfer of labor costs or charges between and among the contracts listed in Exhibit A, or between and among various accounts within those contracts, by employees of the DMO shop in its Evendale plant during the period from June 23, 1980 through December 31, 1983, except that the United States expressly reserves all rights and actions, claims and demands, either in contract, tort, or for delivery of any deficient or defective products, or for liability under any express or implied product liability warranties pertinent to any contracts which are the subject of this agreement, or for any other claims arising out of any of the contracts which are the subject of this agreement, which are not based upon the transfer of labor costs or charges between and among the contracts listed on Exhibit A, or between and among various accounts within those contracts, by employees of the DMO shop at the Evendale plant during the period from June 23, 1980 through December 31, 1983. Moreover, this agreement does not settle claims, if any, arising under the Internal Revenue laws, Title 26, United States Code. Likewise, this agreement does not settle any administrative matter relating to the suspension or debarment of General Electric or any of its affiliates, or any of its officers or employees, pursuant to Subpart 9.4 of the Federal Acquisition Regulations.

C. General Electric agrees that it will never assert any claim, adjustment, or set off, or institute any civil action against the United States which is based on underpayments to General Electric resulting from the transfer of labor costs and charges between and among the contracts listed in Exhibit A, or between and among various accounts within those contracts, by employees of the DMO shop at its Evendale plant during the period June 23, 1980 through December 31, 1983, and General Electric hereby waives any such claim.

D. General Electric agrees that it will not seek reimbursement from the Government, either directly or indirectly, for the amounts paid pursuant to this settlement agreement, or for its costs of investigation of this matter, including attorneys fees.

E. The United States agrees that it will not seek reimbursement from General Electric, either directly or indirectly, for its costs of investigation for this matter, including attorneys fees.

F. In no event are the terms of this agreement intended, nor are they to be construed by the parties hereto, or anyone, to work a release of liability of or in any way create a benefit in favor of any individual, corporation, or business entity not a party to this agreement.

G. The individual executing this agreement on behalf of General Electric certifies that he has been duly authorized by the corporation to execute this agreement on its behalf, and that he has provided to the United States Department of Justice proof of said authorization.

/s/ Vincent B. Terlep, Jr.
VINCENT B. TERLEP, JR.
Attorney for the
United States

Dated: December 13, 1985

/s/ Harry C. Stonecipher
H. C. STONECIPHER
Vice President & General
Manager, Evendale Aircraft
Engine Product Operations
General Electric Company

Date: December 13, 1985

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610

Chief Judge Carl B. Rubin

JOHN MICHAEL GRAVITT,
Bringing This Action On Behalf Of The
United States Government,
Plaintiff,

v.

GENERAL ELECTRIC COMPANY,
Defendant.

STIPULATION OF DISMISSAL

Pursuant to Rule 41(a)(1)(ii) the parties having settled this matter hereby stipulate that it is dismissed with prejudice.

UNITED STATES OF AMERICA

By: /s/ John J. Cruze
JOHN J. CRUZE
Assistant U.S. Attorney

GENERAL ELECTRIC COMPANY

By: /s/ George J. Moscarino
by Stephen J. Brogan
GEORGE J. MOSCARINO

APPENDIX K

SUBSIDIARIES AND AFFILIATES OF THE GENERAL ELECTRIC COMPANY THAT ARE NOT WHOLLY-OWNED

Argentina

Osram Argentina Sociedad Anonima Comercial e Industrial; Medidores Argentinos, S.A.

Brazil

COPLEN S.A. Industria e Commercio; Banco Brasileiro de Investimentos Ipiranga S.A.

Canada

Camco Inc.; Corod Industries Ltd.; General Electric Canada Inc.; Valmet-Dominion, Inc.

Chile

Electromat S.A.

China

The China Car and Foundry Company Limited

France

CFM International, S.A.; Fabrications Mecaniques de l'Atlantique S.A.; Prodis, S.A.; SNEF Electro Mecanique (S.E.M.)

Germany

Westdeutsche Quarzschmelze GmbH

India

Intersil (India) Limited; Elpro International Limited; IGE (India) Limited

Iran

Iran Electrical and Mechanical Services Company

Italy

CGE-Compagnia Generale di Elettricita S.p.A.; CGE-Compagnia Generale Elettromeccanica S.p.A.; Societa Nazionale delle Officine di Savigliano S.p.A.; Turbomotori Internazionale S.p.A.

Japan

Yokogawa Medical Systems, Ltd.; Asahi Diamond Industrial Company, Limited; Koyo Electronics Industries Co. Ltd.; Shinano Tokki Corporation; Toshiba Corporation; C&C International, Ltd.; Drive System Company, Ltd.; Engineering Plastics, Ltd.; Eye Lighting Systems Corporation; Fanuc GE Automation Asia, Ltd.; GEM Chemicals, Ltd.; GEM Polymers Ltd.; Information Services International-Dentsu Ltd.; Japan Nuclear Fuel Company, Limited; Toshiba Electronic Systems Co. Ltd.; Toshiba Silicone Company, Ltd.

Korea

Korean Industrial Motor Company, Ltd.; Daewoo Electric Motor Industries, Ltd.; Samsung Medical Systems

Luxemburg

GE Fanuc Automation Europe S.A.

Mexico

Brelec, S.A. de C.V.; Diesel Industrial y Tractiva S.A. de C.V.; Enseres Electroindustriales, S.S. de C.V.; Grupo Numasa, S.A. de C.V.; Medidores Electromecanicos, S.A. de C.V.; Tragess, S.A. de C.V.; Ultrapol, S.A. de C.V.

Netherlands

GE (USA) Semiconductor B.V.

New Zealand

Donald Brown & Co. Ltd.

Nigeria

American General Electric (Nigeria) Ltd.; IGE of Nigeria Ltd.

Norway

Kvaerner-Calma A/S; A/S Medirad

Philippines

Philacor Realty and Development Corporation; Philippine Appliance Corporation; Philippine Glass Bulbs, Inc.; Philippine Electric Corporation; Pinagkaisa Realty Corporation; Philippine Electrical Manufacturing Company

Saudi Arabia

Middle East Engineering Limited Saudi Arabia; Jamjoom Electrical Distribution Assemblies Company Ltd.; Saudi American General Electric Company Limited

Singapore

Intersil Singapore (Pte.) Limited; Watt & Akkermans Pte. Ltd.

Spain

Construcciones Industriales de Maquinaria e Ingenieria, S.A.; General Electric (USA) Electromedicina, S.A.

Taiwan

Taian Electric Manufacturing Company; United Asia Electric Company

Turkey

TUSAS Motor Sanayii A.S.; General Electrik Turk Anonim Sirketi; TUSAS Aerospace Sanayii A.S.

United States

GE Fanuc Automation North America, Inc.; Springer Mining Company; A.P.—GERECCO Ltd.; Airport Tech Center Associates; Amwest Associates; Arvada-Fremont Developers; Ashley Run Associates; Atrium V Joint Venture; Azdel, Inc.; BMW Credit Corporation; Baconsfield Associates II; Bayou Cogeneration Plant; Bayou Partners Limited; Blue Water; Brandemere Associates I; Brandemere Associates II; CBI Nuclear Company; Century II; CFM International, Inc.; Cardinal Cogen; Center for Advanced Television Studies; Center Stage I Associates; CFC/GECC (New York) Associates II; Cogen Technologies NJ Venture; Coherent General, Inc.; Cool Water Coal Gasification Program; Council Crossing; Dakalb Properties; Diamond Oaks Associates; Dobson Village I Associates; Earth Observation Satellite Company; Eastland; Ebbert's Homes VI; Ebbert's Homes VII; Equipment Financing Associates; Executive Center West Associates; FGIC Corporation; Financo Investors Fund L.P.; Financo Investors Management Partnership L.P.; GECC/GFC (New York) Associates I; GE Credit Auto Resales Services; GE Fanuc Automation Corporation; Gleneagle Associates; Half Dan-Ditlev Simonson; Hearts/ABC-RCTV; High Voltage Breakers, Inc.; Holiday Pines; Holiday Pines Service Corporation; Huntington Apartments; Huntsman; Hydraulic Turbines, Inc.; Keegan Road Associates; Kirby Fletcher Stamford, Ltd.; Kramer Capital Corporation; LCSSC Venture; Lincoln Mesa II

Associates; Locke Insulators, Inc.; MVPPP—Mount Vernon Phenol Plant Partnership; Millicent Way Associates; Mint-Pac Technologies, Inc.; Mira Mesa R&D Associates; National Cash Register; Northchase One Associates; Northchase Two Associates; Northern Oaks Associates; Northern Telecom/General Electric Credit Associates; Northridge Pointe Associates; Oak Hollow II Associates; Otisca Industries, Limited; Ozona Development Drilling Partnership I; Ozona Development Drilling Partnership II; Ozona Development Drilling Partnership III; Park Place Developers, Ltd.; Pathfinder Mines Corporation; Patrick Petroleum Corporation Drilling Program No. 1; Patrick Petroleum Corporation South Louisiana Five Well Investment Package; Pear Tree Joint Venture; Pellicano Business Center Associates; Plum Tree Dallas Associates, Ltd.; Powers Pointe Associates; PTF/GECC Associates I; Pylon; Racom Corporation; Regency Park Associates; Renner Plaza Associates; Resurgens Plaza; Ringwood Avenue Joint Venture Assoc.; Rolling Hills Ranch; Sharon Road West Associates; Shinano Tokki General Corporation; SGE (New York) Associates I; SGE (New York) Associates II; Summit Oakes Associates; Technology Park; The Settling Associates; Timberglen Associates; VHD Electronics, Inc.; Wainoco Appalachian Stamford, Ltd.; Watkins Equity Leasing; Wiles Associates; American Oil and Gas Corporation; Guinness Peat Aviation, Ltd.; Lodgistix, Inc.; Marquette Electronics, Inc.; Medical Ventures, Inc.; Microelectronics and Computer Technology Operation; Movid Information Technology, Inc.; Semiconductor Research Center; Solomon Design Automation Systems; Star Technologies, Inc.; Structural Dynamics Research Corporation; Vicom Systems, Inc.

Uruguay

General Electric de Uruguay S.A.

Venezuela

Industrias Electronicas S.A.; Turbinas y Mecanica C.A.; Manufacturers de Aparatos Domesticos, S.A.; Venezolana de Compresores y Motores S.A.; Vidriolux, C.A.

(2)

NO. 88-182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY,
Petitioner

v.

JOHN M. GRAVITT, *EX REL.* UNITED STATES,
Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

RESPONDENT JOHN M. GRAVITT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RESPONDENT JOHN M. GRAVITT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent John M. Gravitt respectfully requests that this Court deny the Petition for Writ of Certiorari. Respondent contends that no grounds exist for granting a Writ of Certiorari to review this interlocutory appeal for the following reasons:

(1) There is no conflict among the circuits on a significant or recurring question that warrants this Court's consideration;

(2) The decision of the Court of Appeals depends upon the particular facts of this case, *inter alia*, the fact that

adequate discovery was not conducted; Respondent Gravitt, *Qui Tam* Plaintiff in the District Court action, was completely shut out of the negotiations that led to the proposed settlement agreement at issue; Plaintiff Gravitt objected to the terms of the proposed settlement agreement; and the proposed settlement agreement proffered by the General Electric Company ("GE") and the United States was plainly inadequate, especially in light of the False Claims Act Amendments of 1986, and was properly rejected by the District Court.

(3) The Court of Appeals correctly held that the District Court Order refusing to approve the settlement was not appealable because it was not a final Order and was not a "collateral order" appealable under 28 U.S.C. § 1291;

(4) The case currently is pending in the United States Court of Appeals for the Sixth Circuit upon Petition for Writ of Mandamus and in the United States District Court for the Southern District of Ohio on that Court's Trial Docket, and is not, therefore, ripe for consideration by this Court.

(5) Defendant GE has submitted issues to this Court not presented to the District Court and not ruled upon by any court below.

(6) Defendant GE has no standing to raise the question of the constitutionality of the provisions of the False Claims Act providing for judicial review of proposed settlements between the Government and federal contractors.

(7) Congress has the authority to provide a means by which the judiciary can prevent collusion between the Government and federal contractors in False Claims Act cases.

STATEMENT OF THE CASE

In its Petition, Defendant General Electric Company ("GE") mischaracterizes much of what occurred in the proceedings before the District Court and the scope of the investigation performed by the parties prior to the District Court's determination that the proposed settlement was inadequate.

Respondent John M. Gravitt, the *Qui Tam* Plaintiff in this action, was employed by GE for approximately three years in its Cincinnati, Ohio Aircraft Engine Business Group headquarters. During most of his employment, Plaintiff Gravitt was a machinist foreman in Developmental Manufacturing Operations (DMO).

In the course of his duties, Mr. Gravitt learned that labor hours spent on commercial contracts and Government contracts were unlawfully being charged to Government contracts other than those for which the work was actually being performed through alterations to labor vouchers and other means or falsification of labor vouchers. Likewise, idle time was falsely vouchered to Government jobs. Mr. Gravitt was himself instructed to falsify vouchers but refused. When Mr. Gravitt complained to his superiors at GE about the false labor vouchering scheme, his employment was terminated.

Mr. Gravitt thereafter filed this action against Defendant GE on October 26, 1984. The action was brought by Mr. Gravitt on behalf of the United States of America pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3731.[1] In his Complaint, Mr. Gravitt alleged extensive and willful falsification of GE employees' labor vouchers used to calculate charges to the United States pursuant to defense contracts for aircraft engines. Under applicable law as it then existed, the Department of Justice ("DOJ") and the United States Attorney for

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[1] Plaintiff Gravitt brought this action as a *Qui Tam* Plaintiff pursuant to 31 U.S.C. § 3730.

the Southern District of Ohio entered an appearance in December 1984.[2]

From 1984 onward, GE refused to respond to Mr. Gravitt's requests for discovery. Other than limited discovery allowed by the Special Master solely on the question of the reasonableness of the settlement, Mr. Gravitt never was able to obtain requested discovery. Furthermore, contrary to GE's assertions, the DOJ did not engage in any discovery under the Federal Rules of Civil Procedure and the District Court so found. The only investigation ever performed in this case was an abbreviated criminal investigation conducted by the FBI.

After confirming that thousands of GE's employees labor vouchers had been falsified, but without conducting any meaningful discovery, the DOJ and GE determined to settle this action with a $234,000 payment by GE to the Government. (Proposed Settlement attached as Appendix I, Petitioner's Brief, pp. 44a-57a) (hereinafter App. ____, Pet. B. p. ____). This settlement was negotiated in secret and arrived at without involving Mr. Gravitt in any way. GE and the DOJ then filed a Stipulation of Dismissal without advising Mr. Gravitt and without seeking the approval of the Court. (App. J, Pet. B. p. 48a). Such approval is required by 31 U.S.C. § 3730(b)(1).

Mr. Gravitt objected to this plainly inadequate settlement. On January 8, 1986 and after a hearing on the issue, the District Court issued an Order vacating the Stipulation of Dismissal and certifying the issue whether the Trial Court had jurisdiction to approve or disapprove the proposed settlement as appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (App. E, Pet. B. pp. 32a-34a). All parties filed Petitions for Permission to Appeal on January 21, 1986, which Petitions were denied by the Sixth Circuit Court of Appeals. (App. D, Pet. B. pp. 30a-31a).

The District Court thereafter determined "that it ha[d]

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[2] The DOJ has the right to take over conduct of litigation in a False Claims Act suit under 31 U.S.C. § 3730(b)(2).

jurisdiction to consider the fairness of the proposed settlement and to conduct an inquiry therein." The District Court designated United States Magistrate Robert Steinberg as a Special Master pursuant to Fed. R. Civ. P. 53, and directed him to conduct an inquiry, which was to include evidentiary hearings, and thereafter issue a Report and Recommendation on the adequacy of proposed settlement. (App. F, Pet. B. pp. 35a-36a). The District Court also granted Mr. Gravitt's Motion to Intervene pursuant to Fed. R. Civ. P. 24. (App. G, Pet. B. p. 37a).

On October 27, 1986 President Reagan signed into law the False Claims Amendments Act of 1986. Pub. L. No. 99-562, § 2, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729-3733) (1986). These Amendments were passed in part due to the efforts of Mr. Gravitt and in response to GE's and the DOJ's handling of this False Claims Act case.

Meanwhile, contrary to GE's assertions, the Special Master did not conduct an "exhaustive" inquiry into the merits of the proposed settlement. He did not hold an evidentiary hearing as directed by the District Court Judge and by Fed. R. Civ. P. 53(e), nor did he allow Mr. Gravitt to conduct any meaningful discovery on the merits of the settlement proposal or the underlying dispute. Nevertheless, he issued a Report and Recommendation that the settlement entered into between the DOJ and GE be approved. (App. C, Pet. B. pp. 9a-29a). Mr. Gravitt filed a timely Objection to the Report, arguing, *inter alia*, that the Special Master erred by not allowing him to conduct adequate discovery, by not holding an evidentiary hearing, and by failing to apply the 1986 Amendments to the False Claims Act in evaluating the settlement.[3]

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[3] Included in the 1986 Amendments was a provision specifically setting forth the burden of proof. Under the statute as amended, a False Claims Act plaintiff is required to prove the essential elements of the cause of action, including damages, "by a preponderance of the evidence." 31 U.S.C. § 3731. Prior to this Amendment, the statute did not set forth a particular burden of proof, but some courts construing the statute had found that a False Claims

After extensive briefing by all the parties and a two day hearing which included testimony from the FBI agent in charge of the criminal investigation, the District Court Judge issued an Order rejecting the Special Master's Report and Recommendation and returned the case to the Trial Docket. (Attached hereto as App. I, pp. 1a-5a). In his Order, the District Court Judge ruled that the 1986 Amendments to the False Claims Act should be applied to a pending case such as this one.[4] The Court found, therefore, that the settlement must be evaluated with a view towards the Government's ability to prove the allegations by a preponderance of the evidence, a standard different from that relied upon by the Special Master, as well as by the Government investigators in this case. (App. I, p. 3a).

In reaching his conclusion, the District Court Judge specifically found that adequate discovery *had not been* conducted. The Court stated:

> The conduct of the Department of Justice in this matter bears some inquiry. . . . For reasons that have never been made clear, the Department of Justice rather than welcome the assistance of Plaintiff and his counsel, took every step possible to frustrate their participation. The Department of Justice took no deposition, interviewed no witness and instead confined its efforts to opposing all attempts by Plaintiff's counsel to conduct appropriate discovery.

Act claim had to be proven by showing "specific intent to defraud" the United States by "clear, unequivocal, evidence." *See e.g., United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States* v. *Ueber*, 299 F.2d 310, 314-315 (6th Cir. 1962). The 1986 Amendments also increased the damages and penalties payable to the Government and assured *qui tam* plaintiffs a greater role in litigation. 31 U.S.C. §§ 3729-3731.

[4] Other courts have ruled that the 1986 Amendments should be applied retroactively. *See e.g. United States* v. *Hill*, 676 F.Supp. 1158, 1172 (N.D. Fla. 1987). Further, the sponsors of the Amendments clearly stated their intention that they be applied retroactively. 133 Cong. Rec. H9515-9516 (1987).

(*Id.* at 4a). The Court concluded "from the totality of the proceeding thus far," that the proposed settlement was "inadequate." (*Id.* at 5a).

Defendant GE and the DOJ filed interlocutory appeals to the Court of Appeals for the Sixth Circuit from this preliminary Order of the District Court, asserting that the Court had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1). Mr. Gravitt filed a Motion to Dismiss the appeals for the reason that the District Court Order rejecting the proposed settlement was not a final Order and the Court of Appeals, therefore, had no jurisdiction. The Court of Appeals agreed with Plaintiff Gravitt's position and on May 3, 1988 issued an Order granting his Motion to Dismiss. (App. A, Pet. B. pp. 1a-2a).[5]

Thereafter, on May 12, 1988 the DOJ filed a Motion for Extension of Time within which to file a Petition for Rehearing with Suggestion for Rehearing En Banc, asserting it could not prepare its Petition within the fourteen day time period provided by Fed. R. App. P. 40. On May 16, 1988 GE filed a similar Motion for Extension of Time, for the sole reason that the DOJ had requested an extension. GE's Motion was filed *one day* before its Petition for Rehearing was due to be filed in the Court of Appeals.[6] On May 31, 1988 the Court of Appeals denied the Motions for Extension of Time. (App. I, p. 6a). Neither GE nor the DOJ filed a Petition for Rehearing within the time permitted by Appellate Rule 40, thus waiving their right to make such a request.

Later, almost two months after the Sixth Circuit denied GE's and the DOJ's Motions for Extension of Time to Petition

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[5] Neither GE nor the DOJ, however, ever sought a stay of the District Court's Order returning the case to the Trial Docket, and no stay ever has been granted. This case currently is pending in the United States District Court where discovery is now finally being conducted, and trial is set for February 27, 1989.

[6] The parties had fourteen days, up to and including May 17, 1988 to file petitions for rehearing. Fed. R. App. P. 40.

the Court for Rehearing, on July 27, 1988, GE filed a Petition in the Sixth Circuit Court of Appeals for a Writ of Mandamus or Other Appropriate Relief to the United States District Court for the Southern District of Ohio. In the Petition, GE requested that the Sixth Circuit Order the District Court Judge to vacate his Order rejecting the Report and Recommendation of the Magistrate and order him to approve the settlement between GE and the DOJ. GE's Petition for a Writ of Mandamus is currently pending before the United States Court of Appeals for the Sixth Circuit.

GE's Petition for Writ of Certiorari was filed August 3, 1988, seeking the same basic relief it is seeking in its Petition for Writ of Mandamus pending in the Court of Appeals. In both proceedings, GE is attempting to have the District Court's Order rejecting the settlement set aside, the settlement approved, and the case dismissed.[7]

I. THIS CASE PRESENTS NO SIGNIFICANT OR IMPORTANT RECURRING ISSUE OF THE APPEALABILITY UNDER 28 U.S.C. § 1291 OF DISTRICT COURT ORDERS REFUSING TO APPROVE SETTLEMENTS

This case presents an unusual non-recurring situation, rendering it inappropriate for appellate review under 28 U.S.C. § 1291. Simply, two of the three parties to the action attempted to settle the lawsuit over the objections of a third party. Defendant GE and the DOJ entered into the proposed settlement agreement without conducting any discovery under the Rules of Civil Procedure, without the participation of the person who initiated the lawsuit, and without the approval required by law of the District Court Judge. Under

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[7] The DOJ has neither filed a Petition for Writ of Mandamus nor a Petition for Writ of Certiorari.

these circumstances, the District Court Judge properly referred the matter to a Special Master for the purpose of determining the facts and assessing whether the proposed settlement was fair and reasonable. The Special Master, however, did not hold any evidentiary hearings and issued a Report and Recommendation that the District Court Judge approve the settlement without hearing any sworn testimony or even argument from counsel. In the meantime, the 1986 Amendments to the False Claims Act were passed, lessening the burden of proof, increasing penalties, and further defining the substantial rights of *qui tam* plaintiffs, such as Mr. Gravitt.

In his consideration of Mr. Gravitt's Objections to the Report and Recommendation of the Special Master, the Distric Court Judge reviewed the conduct of the parties in this case. The Judge could not have been more clear in his comments that he was deeply troubled by the actions of the DOJ which had done everything in its power to exclude Mr. Gravitt from the case and which had attempted to settle the case without conducting even the most basic discovery. Under these unusual factual circumstances, the District Court Judge properly exercised his discretion to reject the Report and Recommendation of the Special Master, to set aside the settlement, and to schedule this matter for trial.

The facts and circumstances of this case are extremely unlikely to be replicated. Further, this case presents an occasion in which interlocutory appellate review is *not* likely to lead to a different result as it is unlikely that the Court of Appeals would find that the Trial Court Judge abused his discretion in refusing to approve the settlement under these facts and circumstances. Furthermore, this is not a case in which the District Court's decision renders further settlement of this case impossible or improbable. The parties will continue to have the opportunity to discuss settlement and to arrive at a reasonable settlement after proper discovery has been conducted and the impact of the 1986 Amendments to the False Claims Act has been considered.

II. THIS CASE PRESENTS NO CURRENT CONFLICT AMONG THE CIRCUITS CONCERNING APPELLATE JURISDICTION UNDER 28 U.S.C. § 1291

GE erroneously states that this case provides the proper vehicle for resolving a question regarding appealability of orders rejecting a settlement, which this Court reserved in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). At the time of *Carson* there existed a conflict in the circuits on the question whether a court's refusal to accept a settlement is appealable under 28 U.S.C. § 1291. Specifically, the Ninth Circuit had found that such an order was appealable under § 1291. *Norman* v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971). Conversely, the Second Circuit had ruled that such an order was not appealable under § 1291. *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978).

Subsequent to this Court's decision in *Carson*, however, the Ninth Circuit expressly repudiated its decision in *Norman* v. *McKee* and found that a District Court Order refusing to approve a settlement is *not* appealable under 28 U.S.C. § 1291. *E.E.O.C.* v. *Pan American World Airways*, 796 F.2d 314, 318, n. 7 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 874 (1987). Thus, the conflict in the circuits that this Court recognized in *Carson* no longer exists and the reason stated in *Carson* for this Court's possible future consideration of this issue no longer holds true.

Further, GE does not allege and could not show that there is any conflict in the Circuits concerning the question whether a District Court's Order refusing to approve a False Claims Act settlement is immediately appealable pursuant to 28 U.S.C. § 1291. It appears that the United States Court of Appeals for the Sixth Circuit, in this case, is the only federal appellate court to specifically address this question.

III. THIS CASE DOES NOT PROPERLY RAISE ANY SIGNIFICANT QUESTIONS OF PUBLIC IMPORTANCE THAT MANDATE REVIEW BY THIS COURT

GE argues that this Court should grant its Petition for Writ of Certiorari to resolve the allegedly important question whether the District Court Judge's Order unconstitutionally infringes upon the Government's prosecutorial discretion. GE has not raised any important question that requires this Court's review.

A. This Court Should Not Consider An Issue Not Raised In The First Instance In The District Court

GE argues at length that immediate appellate review of the District Court's Order is necessary to "avoid irremedial interference with the Government's prosecutorial discretion." GE asserts that the decision of the Trial Court Judge presents "serious questions of constitutional dimension concerning the proper scope of judicial and executive discretion" and suggests that the Trial Court's actions are unconstitutional and unlawful. None of these arguments or issues were raised in the District Court or ruled upon by the Court of Appeals. They should not, therefore, be considered in the first instance by this Court.

The question before this Court is whether *this* Order of the District Court Judge is sufficiently collateral to render it immediately appealable under § 1291 as an exception to the final judgment rule. GE's challenge to the District Court's Order on constitutional grounds is a thinly disguised challenge to the constitutionality of the False Claims Act which provides for judicial review of proposed settlements between the United States and federal contractors accused of defrauding the Government. Neither GE nor the DOJ alleged in the District Court proceedings that the False Claims Act was unconstitutional and they should not be heard to do so

now. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

B. Defendant GE Has No Standing To Raise The Question Whether The Court's Order Unconstitutionally Infringes Upon The Government's Prosecutorial Discretion

Defendant GE's argument that the District Court Judge's Order refusing to approve this False Claims Act settlement unconstitutionally infringes upon the Government's prosecutorial discretion is an argument that concerns the interests of the United States only. Admittedly, in this instance GE could be a beneficiary of a legal ruling that the District Court Judge does not have the power to disapprove the settlement, but this question does not involve any right that belongs to GE. Review of a collateral order is available to a party only if it "affect[s] *rights* that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430-431 (1985).

Simply put, GE has no standing to advance or argue this issue. This Court has consistently held that a litigant, even though properly before the Court, may not assert the rights of third parties in support of his position. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166 (1972). This policy prevents, in most instances, unnecessary consideration of constitutional issues. *Singleton* v. *Wulff*, 428 U.S. 106, 113-114 (1976). Although exceptions to this rule exist, they apply primarily in cases in which a party is not capable of asserting or protecting his own rights. *See e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 508-510 (1975); *Barrows* v. *Jackson*, 346 U.S. 249, 255-257 (1953).

The United States of America is a full party to this action, having intervened in the case pursuant to 31 U.S.C. § 3737(b)(2). Although dozens of pleadings have been filed in this action, at no time has the DOJ ever raised the issue that

the District Court's Order refusing to approve the settlement entered into between the DOJ and GE is an unconstitutional infringement on the DOJ's prosecutorial discretion. Furthermore, the DOJ chose not to seek a Petition for Writ of Certiorari or to join in GE's Petition.

C. Congress Has The Authority Under The Constitution To Provide The Means By Which The Court Can Prevent Collusion Between The Government And Federal Contractors In The Settlement Of False Claims Act Cases

The District Court's Order is neither unlawful nor unconstitutional. The False Claims Act has long provided that actions may not be dismissed without written approval of the Court. 31 U.S.C. § 3730(b)(1). To alleviate any question concerning the District Judge's authority to oversee False Claims Act cases, the drafters of the 1986 Amendments clarified the Court's power to assure that the Government and defense contractors do not enter into "sweetheart settlements." The Act is crystal clear that the Government may not settle a False Claims Act suit without a hearing and without a determination from the District Court Judge that the settlement is "fair, adequate and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B) (1986 Amendments).

The drafters of the 1986 Amendments were concerned, as was the District Court Judge in this case, that the DOJ was not doing an adequate job of prosecuting defense contractor fraud. *See* comments of Representative Berman of California, 132 Cong. Rec. H6482 (1986). Similar concerns were expressed by Representative Bedell of Iowa, who noted that the Government often will not prosecute defense contractor fraud for political reasons. *Id.* at H6483. Under these circumstances Representative Berman stated that "the *Qui Tam* provisions of the bill are a critically needed supplement." *Id.* at H6482.

Congress clearly has the right to provide for judicial oversight of the DOJ's actions in the prosecution or settlement of

False Claims Act cases. Similar oversight functions are found in the Ethics in Government Act, 28 U.S.C. § 49, 591-598, which provides for District Court review of the Attorney General's refusal to investigate alleged misconduct of Government officials. *Nathan* v. *Attorney General of the United States*, 557 F.Supp. 1186, 1189 (D.D.C. 1983), *rev'd on other grounds*, 737 F.2d 1069 (D.C. Cir. 1984).

The cases cited by GE do not lend credible support to its argument that the judicial oversight provided for in the False Claims Act is unconstitutional. *Heckler* v. *Chaney*, 470 U.S. 821 (1985), concerns the extent to which the decision of an administrative agency to exercise its discretion not to undertake enforcement is subject to judicial review under the Administrative Procedures Act. It does not in any way concern itself with the question whether Congress could have constitutionally provided for judicial oversight in the Administrative Procedures Act.

Similarly, *United States* v. *Dupris*, 664 F.2d 169 (8th Cir. 1981) also is inapposite. The Court in *Dupris* found that the order appealed from had forced the Government to go to trial. In this case the DOJ need not try the case. Mr. Gravitt would be more than happy to prosecute this case on the Government's behalf.

Finally, in *United States* v. *Hamm*, 659 F.2d 624, 629 (5th Cir. 1981), the Court recognized the power of the judiciary to monitor the actions of a prosecutor where his actions are "tainted with impropriety." Mr. Gravitt has alleged from the time this proposed settlement first was announced that the actions of both GE and the DOJ were improper.

GE's position that the DOJ has unfettered discretion to collude with defense contractors and enter into sweetheart settlements and that no judge can act to prevent it, is typical of the arrogance displayed by Defendant GE throughout this litigation. Defense contractor fraud is rampant in this country and Congress has rightly decided that even if the DOJ will not do anything about it, it will give the tools to private

citizens and the Court to assure that action is taken to protect the American taxpayers.[8] In this case the District Court Judge has done nothing unlawful, but has merely attempted to protect the interests of the American public in a situation in which the DOJ has failed to do so. Chief Judge Rubin should be applauded, not criticized, for his courageous stand. The arguments, raised by Defendant GE so late in the day, do not provide any basis for this Court to accept jurisdiction.

IV. THE ORDER OF THE DISTRICT COURT REJECTING THE PROPOSED SETTLEMENT AND STIPULATION OF DISMISSAL IS NOT A FINAL COLLATERAL ORDER

The Court of Appeals correctly determined that the District Court's Order was not a collateral order appealable under 28 U.S.C. § 1291. The collateral order doctrine is a narrow exception whose reach is limited to a small class of prejudgment orders, affecting rights that will be irretrievably lost in the absence of an immediate appeal. *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430-431 (1985); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To qualify as a collateral order, a decision must:

> [C]onclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. *Livesay*, 437 U.S. 463, 468 (1978). A party seeking appeal must show that all three requirements

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[8] Although no one knows how much public money has been lost to fraudulent defense contractors, estimates from the General Accounting Office, DOJ, and Inspectors General range from hundreds of millions of dollars to more than $50 billion *per year*. Legislative History of False Claims Amendments Act of 1986, 132 Cong. Rec. S5267 (1986).

are satisfied. *Stringfellow* v. *Concerned Neighbors In Action*, 107 S.Ct. 1177, 1182 (1987). The Order at issue meets none of these requirements.

GE's reliance upon *Carson* v. *American Brands* is entirely misplaced. *Carson* involves a distinct factual situation[9] and addresses only the question whether the interlocutory order at issue therein was immediately appealable under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction. 450 U.S. at 83-84. In reaching its decision, *Carson* applied a completely different standard than must be applied in determining whether the Order at issue herein is within that "small class" of cases so as to be appealable under § 1291.[10]

A. The District Court's Order Does Not Conclusively Determine The Disputed Question

The District Court Judge determined only that he would not approve *this* settlement at *this* juncture of the case. No one knows what the District Court Judge might do if presented with a settlement proposal after the parties have had an opportunity to conduct meaningful discovery and after the impact of the 1986 Amendments to the False Claims

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[9] In *Carson*, all parties wished to settle the case and were prevented from doing so by the Court. 450 U.S. at 81-82. Conversely, Mr. Gravitt, a full party to this action, objected to the proposed settlement. Furthermore, *Carson* involved litigation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, a significant factor in this Court's determination that the Order refusing to approve the proposed settlement was immediately appealable under 28 U.S.C. § 1292. *Carson*, 450 U.S. at 88, n. 14; *Local No. 93* v. *City of Cleveland*, 106 S.Ct. 3063, 3073 (1986). As this Court explained in *Local 93*, it found the Order in *Carson* appealable because of Congress' strong preference for encouraging voluntary settlements of Title VII litigation. *Id.*

[10] Further, GE's argument that this appeal should be allowed under § 1291 because the *Carson* Court found that the Order therein was appealable under § 1292 is specious. Congress expressly provided in § 1292 that orders refusing injunctions be immediately appealable. No such express authority exists to support GE's argument that all other orders refusing settlements should be immediately appealable under § 1291.

Act has been considered fully. Where the parties are free to return to the bargaining table, an order initially refusing to approve a settlement does not conclusively determine the question whether a settlement can be reached. *Pan American*, 796 F.2d at 317; *State of New York* v. *Dairylea Co-Op, Inc.*, 698 F.2d 567, 570 (2d Cir. 1983); *Seigal* v. *Merrick*, 590 F.2d 35, 37 (2d Cir. 1978).

This case presents an entirely different situation than *Carson*. The *Carson* court indicated that the Order at issue therein conclusively determined the disputed question only because the District Court judge indicated he would not approve *any* settlement containing the injunctive relief requested by the parties. *Carson*, 450 U.S. at 87, n.12. *Carson* does not support GE's argument that all orders refusing to approve all settlement agreements conclusively determine the question whether a settlemet can be reached. This same argument was considered and rejected by the Second Circuit Court of Appeals in *Dairylea*, in which the Court recognized that:

> [A] literal reading of *Carson*'s suggestion that the mere inability to settle could establish irreparable harm would permit appeal from every denial of a proposed settlement. That result was clearly not contemplated by the *Carson* court.

Dairylea, 698 F.2d at 570.

This Court has made clear that the collateral order exception to the final judgment rule does not apply to orders such as the one at issue herein that are "inherently tentative." *Gulfstream Aerospace Corp.* v. *Mayacamus Corp.*, 108 S.Ct. 1133, 1137 (1988).[11] In a concurring opinion Justice Scalia cautioned that the Court's finality jurisprudence "is sorely in need of further limiting principles" and suggested that for a non-final order to be appealable under § 1291, it "must in-

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[11] In *Gulfstream*, the Supreme Court found that an order of the District Court refusing to stay litigation was inherently tentative and, therefore, not appealable under 28 U.S.C. § 1291.

volve 'an important and unsettled question of controlling law, not merely a question of the proper exercise of the trial court's discretion.' " *Id.* at 1145, *citing Boreri* v. *Fiat, S.P.A.*, 763 F.2d 17, 21 (1st Cir. 1985). This approach also is favored by the Second Circuit Court of Appeals, as set forth in *Seigal*:

> [T]he gist of the *Cohen* doctrine 'revolve[s] about issues concerning the *power* of the District Court to render its decision, as distinct from the propriety of its exercise of discretion.'

590 F.2d at 37 (citation omitted) (emphasis in original).

Similarly, the Order of the District Court herein is merely an exercise of the Court's discretion to refuse to approve a settlement improvidently entered into before a proper evaluation of the merits of the case could be made. As such, it is not the final word on the issue and does not satisfy the first prong of the collateral order test.

Further, the alleged unconstitutionality of the District Judge's Order refusing to approve the inadequate settlement of this False Claims Act case does not render this case immediately appealable under 28 U.S.C. § 1291, nor does it mandate this Court's review. Chief Justice Rehnquist rejected a similar argument in *Deaver* v. *United States*, 108 S.Ct. ____, 97 L.Ed. 2d 784 (1987), in which he found that the petitioner's challenge to the constitutionality of the Ethics in Government Act was not sufficiently collateral to fall within the "limited exception" to the final judgment rule. Chief Justice Rehnquist recognized that if orders denying challenges to a statute's constitutionality were immediately appealable, the policy against piecemeal appeals "would be swallowed by ever-multiplying exceptions." 97 L.Ed. 2d at 786, *citing United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 270 (1982).[12] Although both *Deaver* and *Hollywood Motor Car*

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[12] Petitioner Deaver was then requesting a stay of prosecution pending the outcome of his Petition for a Writ of Certiorari. The Court later denied Certiorari. *Deaver* v. *United States*, 108 S.Ct. 99 (1987).

concern challenges to the constitutionality of criminal statutes the same analysis applies. The question of a statute's constitutionality or the constitutionality of an order pursuant to a statute is not sufficiently collateral to justify appeal of an interlocutory order under 28 U.S.C. § 1291.

Petitioner erroneously relies upon *Donovan* v. *Occupational Safety and Health Review Commission*, 713 F.2d 918 (2d Cir. 1983), to support its contention that the Order of the District Court Judge is a collateral order subject to immediate appeal. *Donovan* v. *Occupational Safety & Health Review Commission* specifically concerned a dispute between the Secretary of Labor and the Occupational Safety & Health Review Commission over the question whether the Secretary has discretionary authority to enter into settlement agreements under the Occupational Safety and Health Act (OSHA) or whether his decisions are subject to review of the Commission.[13] Neither this case nor the other similar cases cited by GE address the question presented in this Petition, whether *judicial* orders overruling a decision of the Secretary are collateral and subject to immediate appellate review.[14]

The Court's ruling that the order of the Commission preventing the Secretary from entering into a settlement agreement was appealable as a collateral order turned on the

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[13] The Occupational Safety and Health Review Commission is a branch of the Department of Labor. The Occupational Safety and Health Review Commission, however, has adjudicatory authority under OSHA. *Donovan* v. *Occupational Safety and Health Review Commission*, 713 F.2d at 920.

[14] Contrary to GE's assertion, *Donovan* v. *Occupational Safety and Health Review Commission* does not repudiate *Seigal* v. *Merrick* in cases in which the United States is a party. Rather, the Court states clearly that if the Commission in that case had *disapproved* the settlement, on remand, "the Secretary would be faced with the difficult task of demonstrating that the interlocutory order falls within the collateral order exception." 713 F.2d 924, n. 10, *citing Seigal* v. *Merrick*. This is precisely the posture of this case and *Seigal* remains clear authority for Mr. Gravitt's position that the Order disapproving the settlement is not a collateral order subject to immediate appeal.

specific language of OSHA which gives the Secretary of Labor unfettered discretion to prosecute violations of the Act.[15] Furthermore, the Court was greatly concerned that the impasse between the Secretary and the Commission had allowed serious OSHA violations to go unabated. For these specific reasons, the Court found the Commission's order to be an appealable collateral order. *Id.* at 924.

Conversely, under the False Claims Act, the Government's discretion is limited by the participation of the *qui tam* plaintiff and by the Act's express provision that an action may not be settled or dismissed without the court's written consent. 31 U.S.C. § 3730(b)(1). This fact alone renders the instant case wholly distinguishable from cases involving disputes over the various agencies' powers under OSHA.

B. The Question Whether The Settlement Should Be Approved Is Not Completely Separate From The Merits Of The Action

The question whether the settlement is fair and reasonable and should be approved by the District Court is inextricably enmeshed with the factual and legal issues of the case, precluding immediate appeal under § 1291. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 377 (1981). This is especially true in this instance where the Court determined that the DOJ had not conducted adequate discovery and had thwarted Plaintiff's efforts to conduct his own discovery.

Again, GE's reliance on *Carson* is misplaced. Nowhere in *Carson* does this Court state that an order of the District Court disapproving a settlement is collateral to the merits so as to give rise to jurisdiction under § 1291. Although the *Carson* Court did state in *dicta* that in passing on the settlement, the district court judge does not decide the merits of the case, it also stated that a court must judge the fairness of a pro-

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[15] Only the Secretary of Labor may prosecute OSHA violations; there is no private cause of action. 713 F.2d at 927.

posed settlement "by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." 450 U.S. at 88, n. 14. Likewise, the Second Circuit found that an order disapproving a settlement necessarily is based, in part, on an assessment of the parties' positions. *Seigal*, 590 F.2d at 37. This analysis entails some evaluation of the facts and the law as it should be applied to those facts. An order of the district court judge disapproving a settlement cannot, therefore, be said to be wholly separate from the merits of the case so as to fall within the small class of cases that are appealable under § 1291.

Under GE's analysis of *Carson*, any order of a district court disapproving a settlement would be immediately appealable. That is clearly not the intent of 28 U.S.C. § 1291, nor of the Supreme Court and appellate court decisions cited herein that have narrowly applied the collateral order exception to a limited number of cases and under rare circumstances. Application of the principle advanced by GE would further expand the collateral order exception, in direct contravention to the need for limitation suggested by Justice Scalia in *Mayacamus*, 108 S.Ct. at 1145. Other than the now repudiated decision of the Ninth Circuit in *Norman* v. *McKee*, no court has ruled as GE urges, that orders refusing to approve settlements are collateral to the issues before the Court.

C. The District Court's Ruling Is Reviewable On Appeal From A Final Judgment

Contrary to GE's assertion, it could obtain review of the District Court's Order on appeal after a final judgment. If GE is found at trial to be liable to the Government for more than the proposed settlement, the Court of Appeals could examine the record and determine whether the District Court Judge erred by rejecting the proposed settlement at the preliminary stage. This would be no different than the situation that exists when an appellate court orders that the district court should have granted summary judgment in a

party's favor, thus relieving that party of any liability that may have been established at trial.

V. THE DECISION OF THE COURT OF APPEALS DOES NOT UNDERMINE THE ABILITY OF LITIGANTS TO FAIRLY SETTLE CASES WITHOUT TRIAL

GE unfairly raises the specter that litigants will not be able to settle cases prior to trial without a determination by this Court that all orders refusing settlements are collateral orders that may be immediately appealed. Nothing could be further from the truth. The unusual circumstances of this case concern a situation in which two of the parties to the action are attempting to settle a case over the objections of a third party without conducting any discovery, without evaluating the case under the proper legal standard, and where court approval is necessary. There is nothing in the Appellate Court's decision, or the decision of the Trial Court Judge, that would undermine the ability of all parties to this action to reach a fair and reasonable settlement of a dispute.

Furthermore, GE is attempting to obtain a ruling from this Court that *all* orders refusing to approve settlements are collateral orders subject to immediate appeal under 28 U.S.C. § 1291. This argument is erroneous for a number of reasons. First, if Congress had intended all orders refusing settlements to be immediately appealable, it could have provided for immediate appeal in the same manner in which it provided for immediate appeal of orders refusing injunctions under § 1292. Second, such an order would be contrary to the numerous decisions of this Court that an order is appealable under § 1291 only in a limited and rare set of circumstances and only if it meets all of the requirements set forth in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). An order such as the one sought by GE would unnecessarily reach far beyond the facts and circumstances of this case and establish a rule of law that would likely not be appropriate in

all cases. Finally, the broad rule of law sought by GE is unnecessary because in many instances, appeal of an order refusing to approve a settlement will be immediately available under 28 U.S.C. § 1292.

VI. REVIEW IS IMPROPER BECAUSE THIS CASE STILL IS PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND IT IS NOT A CASE OF IMPERATIVE PUBLIC IMPORTANCE

Just prior to filing this Petition for Writ of Certiorari, GE filed a Petition for Writ of Mandamus to the United States District Court for the Southern District of Ohio. In said Petition, GE requested that the Sixth Circuit Court of Appeals order the District Court Judge to approve the settlement and dismiss the case. If the Sixth Circuit grants the Petition for Writ of Mandamus, GE will have obtained all of the relief it seeks in this Petition for Writ of Certiorari.

This case, which involves only the question whether two of three parties to an action may enter into a settlement agreement the District Court Judge has found to be inadequate, does not rise to the level of imperative public importance this Court has found to exist in the few cases it has accepted for decision despite the fact they were still pending in other courts. Sup. Ct. R. 18. *C.f. Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U.S. 579 (1952) (seizure of the Nation's steel mills during the Korean war); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) (seizure of the Nation's coal mines by President Truman); *Ex Parte Quirin*, 317 U.S. 1 (1942) (apprehension of German agents illegally inside the United States during World War II). This Court, therefore, should not exercise jurisdiction over this case.

VII. CONCLUSION

The United States Court of Appeals for the Sixth Circuit has properly ordered, in this unique case, that the Order of the District Court Judge disapproving the settlement and returning the case to the trial docket is a collateral order not subject to review under 28 U.S.C. § 1291. Petitioner GE has failed to present any reasonable basis for this Court to disturb the opinion of the Court of Appeals. Respondent Gravitt respectfully requests that this Court deny GE's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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September 2, 1988

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-84-1610*

JOHN MICHAEL GRAVITT,

Plaintiff,

v.

GENERAL ELECTRIC CO.,

Defendant.

ORDER
(Filed January 22, 1988)

This matter is before the Court under the following circumstances. John Gravitt, relator herein, brought action against the General Electric Company asserting that there had been substantial overcharges against the United States. On December 13, 1985 the United States represented by the Department of Justice and the General Electric Company entered into a tentative settlement of all claims. This matter was referred to the United States Magistrate (Doc. 31) with instructions to inquire into such settlement. On August 24, 1987 the United States Magistrate filed a Report and Recommendation (Doc. 88) recommending that the Court approve such settlement. On December 18 and 21, 1987 this Court held a hearing at which time evidence and testimony was presented and counsel argued their respective positions for approximately three and one-half hours.

This case turns upon 31 U.S.C. § 3729. A critical and

* Order reported at 680 F.Supp 1162 (S.D. Ohio 1988).

perhaps controlling question to be answered is the retroactive effect of amendments to that section signed into law on October 27, 1986. The amended statute provides in part: "Any person who knowingly presents or causes to be presented to an officer . . . of the United States government . . . a false or fraudulent claim for payment or approval . . . is liable to the United States government for a civil penalty of not less than Five Thousand Dollars and not more than Ten Thousand Dollars plus three times the amount of damages which the government sustains because of the act of that person . . . ." On the same date there likewise became effective an amendment to 31 U.S.C. § 3731 which provides in part as follows: "In any action brought under § 3730 the United States shall be required to prove all essential elements of the cause of action including damages by a preponderance of the evidence. . . ."

Section 3731 prior to amendment did not speak to the level of proof. However, the United States Court of Appeals for the Sixth Circuit in construing the False Claims Acts required that allegations in a civil action be proven by showing "specific intent to defraud" the United States by "clear, unequivocal, evidence." *United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545, 548 (6th Cir. 1976); *United States* v. *Ueber*, 299 F.2d 310, 314-15 (6th Cir. 1962).

While federal appellate courts are yet to address the issue of retroactive application of the 1986 amendments to the False Claims Act, other federal district courts have reached differing conclusions on the issue. *See United States ex rel. Boisvert* v. *FMC Corporation*, No. 86020163 (N.D. Cal. September 9, 1987) (holding that the 1986 amendments may not be applied retroactively to cut off a defense which existed under the old law); *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987) (strictly construing statute to apply prospectively only); *United States* v. *Hill*, MCA No. 84-2144-RV (N.D. Fla. November 12, 1987) (holding that retroactive application of amendments will not result in manifest injustice). In a well-reasoned opinion in *Hill*, Judge Vinson applied the well-settled principle of statutory construction enunciated by the

Supreme Court in *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974) "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice or there is statutory or legislative history to the contrary." After careful consideration of the facts in the present case, the Court finds that retroactive application of the 1986 amendments to the False Claims Act does not result in a manifest injustice. Moreover, the Court agrees with Judge Vinson that concern for the public well-being militates toward the immediate application of the amendments.[1]

It was established at the hearing that the Department of Justice of the United States directed the FBI to conduct an inquiry. Special Agent John Ryan of the Cincinnati Office was assigned to this task and did conduct such an inquiry. Agent Ryan conducted a criminal investigation and concluded that based upon the evidentiary standard of "proof beyond a reasonable doubt" a criminal prosecution could not be sustained. It may be asserted that since Agent Ryan was an accountant by training that his conclusion regarding financial fraud also embraced a "clear and convincing" test of fraud. Agent Ryan was not concerned with a preponderance of evidence inquiry and insofar as the record indicates did not use that standard. The Court has no reason to question the conclusion of the FBI that there is insufficient evidence for a criminal prosecution.

In view of the extensive investigation made by the FBI and in view of the equally extensive inquiry by the United States Magistrate the Court believes that if a clear and convincing test were to be used, the settlement should be approved.

However, because this Court holds that the 1986 amendments apply retroactively to this matter, the settlement must be tested with a view toward the Government's ability to prove allegations by a preponderance of the evidence, with no requirement to show specific intent to defraud.

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[1] It is interesting to note that in *Hill*, the Government took the position that the amendments should be retroactively applied, contrary to its position in the present case.

It is beyond doubt that there have been instances of massive fraud perpetrated by manufacturers upon the United States and in some instances either aided or overlooked by the various procuring agencies. Terms such as "a $500.00 hammer" or a "$6,000.00 coffee maker" have been used as a form of shorthand to indicate how vast the overcharges have been. This is not to determine that there was in fact fraudulent conduct in this case, but simply to indicate that matters of this sort should be approached with somewhat more caution than they might have been approached fifteen years ago.

The conduct of the Department of Justice in this matter bears some inquiry. There isn't a Judge in the United States who has not at some time been confronted with a litigant, usually *pro se*, who describes a conspiracy so vast as to include the entire governing structure of the United States. Great expenditures of time, energy and money are frequently required to demonstrate that the assertion is either out of ignorance, a spirit of revenge by a disgruntled former employee, or the product of paranoia. It is entirely possible that the Department of Justice approached this case in the first instance with the same view in mind. That initial view is excusable. The subsequent conduct of the Department of Justice is not. It must have developed early on that Mr. Gravitt does not fit the customary pattern of the conspiracy alleging litigant and even more important his counsel is a highly respected and exceedingly competent member of the bar of this Court. Regrettably, the legal profession has its share of "scavengers" — those attorneys who lurk on the edge of propriety and who will commence meritless litigation solely for the purpose of extracting a nuisance value settlement. Such acts approach extortion and contribute to the general public disdain for our profession. Plaintiff's counsel, however, is demonstrably a very competent, skilled and effective lawyer. That if nothing else should have convinced the Department of Justice that here was an ally to be encouraged, who was willing to relieve the Department of Justice of the expenditure of manpower and money in conducting appropriate discovery. For reasons that never have been made

clear, the Department of Justice rather than welcome the assistance of plaintiff and his counsel, took every step possible to frustrate their participation. The Department of Justice took no deposition, interviewed no witness and instead confined its efforts to opposing all attempts by plaintiff's counsel to conduct appropriate discovery.

A specific instance deals with an official of the General Electric Company whom plaintiff wishes to depose. That witness refused to answer asserting the privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution. In response to direct questions by the Court, counsel for the United States admitted that there was no criminal prosecution pending nor was any contemplated out of the facts in this case. Despite the lack of such proceedings the United States continues to refuse to immunize that official and thereby enable the plaintiff to proceed with discovery. This is not to suggest that the Court has determined that simply because a person has asserted a Fifth Amendment right against self-incrimation, that such is evidence of guilt. Not so. This event has been cited solely to point out the remarkable lack of cooperation given by the Department of Justice.

The Department of Justice and the General Electric Company propose to settle all claims by the payment of $234,000.00. In light of the provision in the 1986 amendments for increased penalties, a lesser burden of proof and no requirement for proof of specific intent, the Court determines from the totality of the proceeding thus far that such a settlement is inadequate. Therefore the Court rejects the Report and Recommendation of the United States Magistrate and this case is hereby returned to the trial docket.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-3171, 88-3264

JOHN MICHAEL GRAVITT, BRINGING THIS ACTION ON BEHALF OF THE UNITED STATES GOVERNMENT,
Plaintiff-Appellee,
Cross-Appellant,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellant,
Cross-Appellee.

ORDER
(Filed May 31, 1988)

Upon consideration of the motions of the appellant and the cross-appellant for extensions of time in which to file petitions for rehearing en banc,

IT IS ORDERED that the motions be, and they hereby are, DENIED.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

No. 88-182

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND JOHN M. GRAVITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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MEMORANDUM FOR THE UNITED STATES

In this case, the United States and General Electric Company (GE) agreed to settle an action originally brought by respondent Gravitt under the *qui tam* provision of the False Claims Act (FCA), 31 U.S.C. (& Supp. IV) 3729 *et seq.* The district court rejected the proposed settlement, and declined to dismiss the action. When the United States and GE sought to appeal that decision, the court of appeals dismissed the appeals, concluding that the district court's action was not a final, appealable order under 28 U.S.C. 1291 (Pet. App. 1a-2a). GE now asks this Court to review the court of appeals' ruling on the question of appealability.

We decided not to petition on behalf of the United States in this case because we were unable to conclude that further review of the court of appeals' unpublished deci-

sion is warranted at this time. We nevertheless agree with petitioner that the decision of the court of appeals is incorrect, and that this case presents a potentially important procedural question that this Court has expressly reserved. Accordingly, we do not oppose GE's petition.

1. Petitioner's statement of the case (Pet. 3-8) contains the information material to the consideration of the issue presented. We therefore provide only a brief summary of the relevant facts. Promptly after this *qui tam* action was filed by respondent Gravitt, the United States entered an appearance and exercised its right under the statutory provisions then in effect (31 U.S.C. 3730(b)(2)) to assume responsibility for the litigation. After an extensive investigation, the government negotiated and entered into a settlement with the defendant, GE, under which GE agreed to pay $234,000 in lieu of the civil penalties that the United States might have sought under the FCA, and also agreed to forego any claims against the United States based on the apparently substantial net undercharges to the government that had resulted from the scheme of GE's employees (Pet. App. 45a-46a). In submitting a proposed stipulation of dismissal to the district court, the United States asserted that the district court had no authority to assess the adequacy of the settlement under the terms of the statute as it then stood. See 31 U.S.C. 3730(b)(1).[1]

Following the district court's assertion of authority to review the adequacy of the settlement (Pet. App. 32a-34a) and the court of appeals' refusal to accept an interlocutory appeal, certified by the district court under 28 U.S.C.

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[1] We also argued that Gravitt had no right to object to the settlement since he was not a proper relator under the existing statute because the information upon which the action was based was already within the knowledge of the government at the time the action was commenced (31 U.S.C. 3730(b)(4)).

1292(b), on the question of the district court's authority (Pet. App. 30a-31a), the district court referred the case to a special master to assess the fairness of the proposed settlement (*id.* at 35a-36a). After extensive proceedings, including discovery by Gravitt (whose motion to intervene had been granted by the district court (*id.* at 37a)), the special master issued a full report. The report concluded (*id.* at 9a-29a) that "the US diligently investigated the violation alleged by Gravitt, and that the proposed settlement is fair, adequate, and reasonable under all the circumstances" (*id.* at 29a).

While the case was pending before the special master, the 1986 amendments to the FCA were enacted.[2] Those amendments generally increase the penalties for a false claims violation (see, *e.g.*, 31 U.S.C. (Supp. IV) 3729(a) (mandatory forfeiture increased from $2,000 per false claim to not less than $5,000 and not more than $10,000 per false claim)), and make it easier for the government to prove a violation (see, *e.g.*, 31 U.S.C. (Supp. IV) 3729(b) ("no proof of specific intent to defraud is required")). In urging the district court to uphold the special master's report, the United States argued that the district court should evaluate the reasonableness of the settlement in light of the law in effect at the time it was agreed to, rather than under the provisions of the 1986 amendments.[3] In particular, the United States argued that a new provision authorizing a district court to determine whether a settlement to which a relator objects is "fair, adequate, and

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[2] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

[3] The United States did not contend that the 1986 FCA amendments are inapplicable in their entirety to cases pending at the date of enactment. Indeed, we have argued that some parts of the amendments should be given retroactive effect.

reasonable under all the circumstances" (31 U.S.C. (Supp. IV) 3730(c)(2)(B)), should not be construed to authorize judicial review of the adequacy of a settlement entered into before the enactment of the amendments. The United States also argued that, in light of the potential difficulties of the case and the substantial benefits to be derived from the settlement, the settlement should be considered fair and adequate under any possible standard. Thus, on appeal, the United States would have argued both that the district court was without authority to pass on the adequacy of the settlement, and that—even if the court had such authority—it abused its discretion by declining to approve the settlement before it.

In a brief unpublished order, the court of appeals dismissed the appeals filed by petitioner and the United States. Relying on *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), the court of appeals stated that the district court's order refusing to accept the settlement was neither a final collateral order appealable under 28 U.S.C. 1291, nor an interlocutory order refusing an injunction appealable under 28 U.S.C. 1292.

2. Although this Court has repeatedly stressed that the collateral order doctrine must be applied only to a "small class" of orders (*Van Cauwenberghe* v. *Biard*, No. 87-336 (June 13, 1988), slip op. 4; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), there are substantial arguments why a district court order rejecting a settlement agreement should be regarded as an appealable "collateral order" under 28 U.S.C. 1291. Moreover, as petitioner explains (Pet. 8-10), the question whether such an order may be appealed as a collateral order is a matter of considerable uncertainty that has not been resolved by this Court.

The Court recently reiterated in *Van Cauwenberghe* that the established test for identifying an appealable collateral

order comprises three elements: the order "must (1) 'conclusively determine the disputed question', (2) 'resolve an important issue completely separate from the merits of the action', and (3) 'be effectively unreviewable on appeal from a final judgment' " (slip op. 4-5 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). There can be little doubt that the district court's order rejecting the instant settlement " 'conclusively determine[d]' " two distinct questions: whether the court had authority under the statute to rule upon the propriety of the settlement, and whether (assuming it had such authority) the particular settlement reached was fair and reasonable. Furthermore, these questions are both arguably important ones that are " 'completely separate from the merits.' " While the Court has continued to apply the latter phrase with great stringency (see *Van Cauwenberghe*, slip op. 10-12), it has also recognized that courts assessing the fairness of a settlement "do not decide the merits of the case or resolve unsettled legal questions" (*Carson* v. *American Brands, Inc.*, 450 U.S. at 88 n.14). Certainly, the issue of the propriety of a settlement is "conceptually distinct" from the merits of an FCA case. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985). Finally, and perhaps most importantly, a trial court order refusing to accept a settlement will generally be—as it plainly is here—"effectively unreviewable on appeal from a final judgment." The settlement in the present case, by its own terms, lapses in the event that it is finally disapproved and the case goes to trial (Pet. App. 45a). Such provisions are by no means unusual, since one of the major inducements to settlement is the avoidance of litigation costs, and forcing a case to trial largely defeats the purpose of settlement. Thus, the right of parties to settle litigation on terms they consider mutually advantageous will frequently be lost irrevocably unless such orders may be appealed.

The issue whether orders refusing to approve settlements are appealable under 28 U.S.C. 1291 has received conflicting answers in the past. Indeed, in *Carson* v. *American Brands, Inc.*, this Court expressly noted the existence of a split of circuit authority on that question (450 U.S. at 82-83 n.6). In *Carson*, however, the Court found it unnecessary to resolve that conflict, since it held that the order in question was appealable under 28 U.S.C. 1292(a), as the effective denial of an injunction (450 U.S. at 83 & n.7).[4] After *Carson*, the conflict has dissipated somewhat, since the circuit that had previously announced the clearest holding to the effect that such orders were appealable under Section 1291 subsequently reversed itself, stating that *Carson* had resolved the issue in favor of allowing such appeals only under Section 1292(a). *EEOC* v. *Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), cert. denied, 479 U.S. 1030 (1987). While we disagree with that reading of *Carson*, it certainly diminishes the vitality of any split of circuit authority, since the only remaining circuit that has allowed such appeals has done so without discussion of the jurisdictional issue. See *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973).[5]

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[4] In the court below, petitioner and the United States also invoked Section 1292(a) as supporting appellate review, arguing that the order sought from the district court was partly injunctive in character because it would have barred petitioner from making certain future claims. Petitioner has not sought review of that question in this Court.

[5] As the Court noted in *Carson* (450 U.S. at 82-83 n.6), the appealability of such orders under 28 U.S.C. 1291 had been denied by the Fourth Circuit in the case then under review (606 F.2d 420 (1979)), and by the Second Circuit in *Seigal* v. *Merrick*, 590 F.2d 35 (1978). See also *Donovan* v. *Robbins*, 752 F.2d 1170, 1172 (7th Cir. 1985) (dictum agreeing with those holdings).

3. Whether or not orders disapproving settlements should be appealable under the collateral order doctrine as a general matter, two additional considerations make the case for allowing such appeals in the present circumstances especially compelling. First, as noted above, we have argued not only that the settlement should be approved, but that the district court was without authority to disapprove it. The question of the district court's authority to review the adequacy of the settlement is entirely separate from the merits, since it does not require any consideration of the particular facts of an individual case.

The Second Circuit recognized this distinction in *Donovan* v. *Occupational Safety & Health Review Commission*, 713 F.2d 918 (1983). There, the Secretary of Labor had petitioned for review of an order of the Occupational Safety and Health Review Commission (OSHRC) holding that it had the authority to review a settlement entered into by the Secretary. The court indicated that under its earlier ruling in *Seigal* v. *Merrick*, 590 F.2d 35 (1978), an order disapproving the settlement would itself probably not be an appealable collateral order (713 F.2d at 924 n.10). Nevertheless, the court held that the Secretary could invoke the collateral order doctrine to obtain review of the threshold question whether OSHRC had authority to review the settlement in the first place (*id.* at 923-924). See also *Marshall* v. *Oil, Chemical & Atomic Workers Int'l Union*, 647 F.2d 383, 387 (3d Cir. 1981).

Although the presence of the question of the district court's authority to review the adequacy of the settlement makes this a stronger case for application of the collateral order doctrine, the addition of this element does not appear, however, to establish a substantial split in circuit authority. The Sixth Circuit itself has entertained a petition for review in circumstances similar to those presented in *Donovan* v. *OSHRC*, *supra*, and *Marshall* v. *Oil*,

Chemical & Atomic Workers Int'l Union, supra. See *Marshall* v. *OSHRC,* 635 F.2d 544, 548-549 (6th Cir. 1980). And there is nothing in the brief order entered in the present case to suggest that the Sixth Circuit has disavowed its earlier decision in *Marshall* v. *OSHRC, supra.* Moreover, unlike the issue in the OSHA cases, the precise question here—whether the district court lacked authority to review the propriety of the settlement under the pre-amendment FCA—is unlikely to recur, since the 1986 FCA amendments unquestionably apply to all newly filed actions under the Act's *qui tam* provisions.

There is another important reason why this case is unlike routine cases in which settlements are rejected. While other statutes that require judicial approval of settlement agreements generally seek to protect a variety of private interests, such as those of class members or corporate shareholders, the review of settlements under the FCA directly affects—and may impede—the actions of the Executive Branch in its enforcement of the law. As petitioner correctly notes (Pet. 17-19), the conduct of litigation on behalf of the United States is a central part of the President's Article II authority to "take Care that the Laws be faithfully executed," and indeed members of this Court have, on more than one occasion, questioned whether there can be any proper judicial role in accepting or rejecting settlements reached by the government. See *Maryland* v. *United States,* 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129, 156-157 (1967) (Stewart, J., dissenting).

Assuming that the district court was properly called upon to assess the fairness and reasonableness of the settlement under the 1986 FCA amendments, these principles of separation of powers should nonetheless inform decisions concerning the exercise of that delicate responsi-

bility. Specifically, they should weigh heavily in favor of permitting an immediate appeal in cases such as this. Where a district court improperly substitutes its judgment for that of the officials responsible for the conduct of litigation, a serious intrusion into Executive Branch responsibilities will be irrevocable unless some avenue exists for effective review.[6] Although this consideration would not by itself render an interlocutory order appealable, it is certainly a proper factor to weigh in considering whether the rejection of a settlement is a collateral order. Cf. *Mitchell* v. *Forsyth*, 472 U.S. at 526-527 (discussing, in the course of collateral order analysis, the importance of underlying policies of limiting interference with actions by federal officials).

4. While petitioner correctly notes (Pet. 19) that numerous *qui tam* actions are now pending under the FCA as amended, the instant case is, thus far, the only one in which a government settlement has been disapproved. Accordingly, it is unclear at this time how often the issue of appealability will arise, or if it does arise, whether the court of appeals' unpublished opinion in the instant case will have any influence on other courts. In addition, although the general question of the appealability of deci-

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[6] The present case brings these concerns into sharp focus. The district court's order rejecting the special master's report and disapproving the settlement fails to demonstrate any inadequacies in the government's investigation or negotiation of this case; instead, it displays an alarming willingness to second-guess the actions and motives of the Executive Branch officers appearing before it (Pet. App. 6a-7a). For example, the court suggested that an Executive Branch decision not to grant immunity to secure testimony in this civil action could constitute grounds for rejecting the settlement (*id.* at 7a-8a). While this Court is not, in this petition, called upon to assess the correctness of any of the actions of the district court, we submit that the government should have some opportunity to present such issues to an appellate tribunal.

sions rejecting settlement agreements under 28 U.S.C. 1291 is one over which there is a good deal of uncertainty, there is not, at present, a substantial split in authority on that question among the federal courts of appeals. For those reasons, the United States did not file a petition for a writ of certiorari in this case.

We nevertheless agree with petitioner that the court of appeals erred in dismissing the appeals on the ground that the district court's rejection of the settlement was not a collateral order appealable under 28 U.S.C. 1291. Because we believe the court of appeals erred in dismissing the appeals, and because the issue may be of some continuing significance, the United States does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1988

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No. 88-182

IN THE
Supreme Court of the United States
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GENERAL ELECTRIC COMPANY,
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and
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY MEMORANDUM OF PETITIONER GENERAL ELECTRIC COMPANY

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REPLY MEMORANDUM OF PETITIONER GENERAL ELECTRIC COMPANY

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1. *The United States Agrees That This Case Presents an Important and Unsettled Question.*

The United States agrees with petitioner General Electric Company ("GE") that this case properly frames the issue left open in *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.7 (1981), that the court below erred in concluding that no appeal lies from the rejection of a settlement, and that the issue is of continuing importance. Memorandum for the United States ("U.S. Mem.") at 2. The Solicitor General has advised the Court that appeal under 28 U.S.C. § 1291 of an order rejecting a set-

tlement is particularly important where, as in this case, the appeal questions the statutory and constitutional authority of the district court to interfere with the exercise of a law enforcement determination committed by Article II of the United States Constitution to the Executive Branch. U.S. Mem. at 7-9.

> Where a district court improperly substitutes its judgment for that of the officials responsible for the conduct of the litigation, a serious intrusion into Executive Branch responsibilities will be irrevocable unless some avenue exists for effective review.

U.S. Mem. at 9. These questions will not be reviewable after trial.

The Solicitor General has explained that he did not file a separate petition for certiorari primarily because the existence of a circuit conflict on the question of the appealability under § 1291 of an order rejecting a settlement is not clear. U.S. Mem. at 10. At the same time, the Solicitor General acknowledges that the question presented "is a matter of considerable uncertainty" that "has received conflicting answers in the past" from the courts of appeals. U.S. Mem. at 4, 6.

The government's memorandum observes that the conflict among the circuits on the § 1291 question that this Court had identified in *Carson*, 450 U.S. at 82-83, has been "dissipated somewhat" by the Ninth Circuit's subsequent decision in *EEOC v. Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 874 (1987). U.S. Mem. at 6. But the government also notes that in changing course the Ninth Circuit actually misread *Carson*. U.S. Mem. at 6. The clear conflict that existed prior to the *Pan American* decision has thus been obscured only by the erroneous determination in *Pan American*, followed by the court below, that *Carson* implicitly precluded appeal of orders preventing settlements under § 1291 (*Pan American*, 796

F.2d 314, 318 n.7), despite this Court's express reservation of the issue (450 U.S. at 83 n.7). The erroneous *Pan American* decision, accordingly, has not diminished but rather has intensified the need for guidance from the Court on this issue.

2. The United States Agrees That the Standards for Appeal Under 28 U.S.C. § 1291 Are Satisfied in This Case.

The United States agrees that the district court's order rejecting the settlement meets the criteria established by this Court for identifying an appealable collateral order:

> [T]he order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote omitted). *See Van Cauwenberghe v. Biard*, 108 S. Ct. 1945, 1949 (1988).

Gravitt asserts that the order rejecting the settlement is not conclusive, because "the parties are free to return to the bargaining table" after "meaningful" civil discovery, which he contends to be necessary for the United States to assess this case adequately. Gravitt's Brief In Opposition ("Gravitt") at 16-17. But, as the Solicitor General has noted (U.S. Mem. at 3), the Special Master found that "the U.S. diligently investigated the violation alleged by Gravitt" through a joint criminal-civil investigation involving an audit by the Defense Contract Audit Agency, extensive interviews by the FBI, and a grand jury investigation. Pet. App. C at 16a-24a, 29a. Accordingly, the United States properly concluded that it had no need also to conduct civil discovery to determine the strength of its case. The district court thus has finally and irrevocably decided that the parties may not termi-

nate this litigation on the terms that they consider appropriate.

Gravitt's contention that the rejection of a settlement does not resolve an issue separate from the merits is predicated on his characterization of this Court's contrary determination in *Carson* as mere "*dicta*." Gravitt at 20. This Court in *Carson* said that courts properly "do not decide the merits of the case or resolve unsettled legal questions" in reviewing settlements. 450 U.S. at 88 n.14. The analysis provided in *Carson* may not be so disregarded, unless and until this Court itself concludes that it wishes to disavow it. *Cf. United States v. Mason*, 412 U.S. 391, 396 (1973). Moreover, as the United States correctly notes and Gravitt does not dispute, the question of the district court's authority to review the adequacy of the government's settlement is plainly unrelated to the merits of the case. U.S. Mem. at 7.

Finally, Gravitt's contention that the district court's order rejecting the settlement may be effectively reviewed after final judgment ignores this Court's contrary determination in *Carson*, 450 U.S. at 87-88, as well as the terms of the settlement. As the Solicitor General has explained, the settlement is intended to avoid litigation costs and lapses in the event that the case is forced to trial. U.S. Mem. at 5.[1]

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[1] Gravitt also suggests that the district court's order should be viewed as an "inherently tentative" discretionary determination that does not involve the kind of "important and unsettled question of controlling law" which Justice Scalia suggested is more appropriate for immediate appeal in his concurring opinion in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1145 (1988). Gravitt at 17-18. Even if the Court were to add that additional limit to the standards for collateral finality under § 1291, this case would satisfy that restrictive standard. As the Solicitor General points out, the district court's order conclusively determined not only whether the settlement was fair and reasonable but also resolved the unsettled and controlling legal question of the court's authority to prevent the settlement and refuse to dismiss this

3. *Immediate Appellate Review Is Needed to Prevent Private Interlopers From Displacing the Department of Justice in the Prosecution of False Claims Act Cases.*

Gravitt argues that this case differs from *Carson* because, unlike *Carson*, not all of the "parties" have agreed to the settlement, just GE and the government. Gravitt at 8, 16 n.9. Thus, Gravitt proclaims that "the DOJ need not try the case" because he is "more than happy to prosecute this case on the government's behalf." Gravitt at 14. But this argument presumes that Gravitt enjoys authority to represent the United States in advancing its monetary claims and to object to the settlement negotiated and approved by the Department of Justice as the constitutionally exclusive representative of the interests of the United States. Both GE and the government challenge his legal right to usurp that responsibility. *See* U.S. Mem. at 2 n.1, 8. It is the responsibility of the Department of Justice to determine how best to enforce the law on behalf of the United States.

Unless the district court's order here is subject to immediate appeal, the order will effectively deprive the Department of Justice of its litigating discretion, as well as the benefit of a $234,000 settlement, in an apparent effort to enable Gravitt to try an action that the Special Master, consistent with the Justice Department, found to be "highly unlikely to produce as satisfactory a result as . . . the proposed settlement." Pet. App. C at 28a. Indeed, the government determined that there is a substantial risk that a trial would lead to no recovery at all. The decision to take $234,000 rather than take a gamble that might cost the government its entire claim belongs to the Justice Department, not a private interloper.

In an attempt to justify the district court's order and his role in this case, Gravitt suggests that the review

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action, despite the decision of the Executive Branch to do so. U.S. Mem. at 5.

and rejection of the settlement were necessary to "prevent collusion" between the United States and GE that he alleges has produced a "sweetheart settlement" that is "improper." Gravitt at 13-14. But the Special Master, in findings that the district judge did not dispute, determined that there was no evidence of any such improper "collusion" and that GE "should not be criticized because it cooperated with the government—it should be congratulated for its attitude." Pet. App. C at 25a, 28a. Some courts have indicated that a prosecutor's decision to dismiss an action under Fed. R. Crim. P. 48(a) may be rejected "in extraordinary cases . . . when the prosecutor's actions clearly indicate a 'betrayal of the public interest.'" *United States v. Hamm*, 659 F.2d 624, 629 (5th Cir. 1981) (en banc). This Court should direct the court of appeals to determine whether, as in this case, bare and unsubstantiated allegations maligning the good faith of the Department of Justice will suffice to justify unreviewable judicial interference with the government's discretion to resolve its interests without years of further litigation.

CONCLUSION

(1) This case clearly presents an issue which this Court has reserved for decision.

(2) The Solicitor General agrees that the issue is of continuing importance.

(3) The issue is squarely presented in this case so that it is ripe for decision.

Certiorari should be granted.

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September 28, 1988